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**The Mexican Fideicomiso :  
Theoretical and Practical Approach**

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## **ABBREVIATIONS**

Art. /art.	Article.
BM	<i>Banco de México.</i> Mexican National Bank.
CC	<i>Código Civil.</i> Civil Code.
CCom	<i>Código de Comercio.</i> Commercial Code.
CFF	<i>Código Fiscal de la Federación.</i> Mexican Tax Code.
CNBV	<i>Comisión Nacional Bancaria y de Valores.</i> National Banking and Securities Commission.
E.g.	Example.
f.	Section.
IETU	<i>Impuesto Empresarial a Tasa Única.</i> Flat Rate Business Tax.
ISAI	<i>Impuesto sobre Adquisición de Bienes Inmuebles.</i> Real Estate Transfer Tax.
LBM	<i>Ley del Banco de México.</i> Mexican National Bank Law.

LGICEB	<i>Ley General de Instituciones de Crédito y Establecimientos Bancarios.</i> General Law of Credit Institutions and Banking Establishments.
LIC	<i>Ley de Instituciones de Crédito.</i> Banking Law.
LIE	<i>Ley de Inversiones Extranjeras.</i> Foreign Investment Law.
LIF	<i>Ley Federal de Instituciones de Fianzas.</i> Bonding Companies Law.
LISMS	<i>Ley General de Instituciones y Sociedades Mutualistas de Seguros.</i> General Law of Mutual Insurance Companies and Institutions.
LISR	<i>Ley del Impuesto sobre la Renta.</i> Income Tax Law.
LMV	<i>Ley del Mercado de Valores.</i> Securities Market Law.
LOBANSF	<i>Ley Orgánica del Banco del Ahorro Nacional y Servicios Financieros.</i> National Savings and Financial Services Bank Law.
LTOC	<i>Ley General de Títulos y Operaciones de Crédito.</i> General Law of Negotiable Instruments and Credit Operations.
No.	Number.
n.p.	No page number.
p.	Page.

p.p.	Pages.
pr.	Paragraph.
PRREP	<i>Registro Público de la Propiedad y el Comercio.</i> Public Registry of Real Estate Property and Commerce.
VAT	Value Added Tax.
Vol.	Volume.

## INTRODUCTION

The *fideicomiso*, like the Trust, is considered as one of the most versatile figures for the free disposition of property, and has been widely used in the financial industry amongst others. This versatility has allowed the *fideicomiso* to be used as a solution for various numbers of problems and legal limitations, not only in the personal field (such as testamentary limitations) but also in the business arena (financial decisions, investment projects, etc.). As a result, we have seen an “economic and social boost”<sup>1</sup> in Mexico.

We can trace back the existence of the *fideicomiso* to Roman times; its development can be followed throughout Roman, German and Anglo-Saxon legislation, up to modern times.

As we will see throughout this work, the major influence of the Latin American *fideicomiso* comes from Anglo-Saxon Trusts, which have existed for many centuries. Given the important and common use of Trusts in Common Law legislations, the Mexican legislators considered of importance to include this figure to Mexican Law and adapt it, in order to address specific needs of the Mexican reality. At the same time, other figures, such as the roman *fiducia*, also contributed to the evolution of the Mexican *fideicomiso*.

Even though the *fideicomiso* has only been of existence in Mexican laws since the last century, this was the first Latin American country to adapt it to its legislation (1924), being a pioneer of this figure in Latin America (Latin American economies adopted the *fideicomiso* as a copy of the Anglo-Saxon Trusts). In Mexico, the first use of the *fideicomiso* was for business purposes and it was not until later that it started to be used for the benefit of individuals, as we will see in the following chapters of this work. Nowadays, it is used for both purposes, but most commonly in business.

The purpose of this work is to study how the Mexican *fideicomiso* works and its current application, as well as the resemblances and connections it has with Trusts. This work is divided into five parts. The first one will be dedicated to the historical and legal backgrounds of the figures that have been of importance in the development of the

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<sup>1</sup> WUNDERLICH GUMPEL, Mario, *Factibilidad de incrementar en Guatemala el uso del Fideicomiso*, Tesis de Maestría no Publicada, Universidad Francisco Marroquín, Facultad de Ciencias Económicas, Guatemala 1980, p.1, [www.tesis.ufm.edu.gt/pdf/61.pdf](http://www.tesis.ufm.edu.gt/pdf/61.pdf)

*fideicomiso*; together with the historical and legal background of the Mexican *fideicomiso* in particular.

On the second part, we discuss the most important characteristics of Trusts; in order to understand its connection with the *fideicomiso*, its importance, and influence in the *fideicomiso*'s development.

We will then come to an in-depth analysis of the *fideicomiso* in the third chapter, where we will study the nature of the *fideicomiso* as well as the legal dispositions that regulate this figure nowadays.

The fourth chapter is a general overview of the tax treatment of the *fideicomiso*. However, as tax treatment is not the specific purpose of this work, we will only mention the most important tax dispositions applicable to the *fideicomiso*.

And finally, on the fifth part before the conclusion of the work, we will present a comparative chart between the *fideicomiso* and the Trust, in order to be able to understand in a broader way the similarities that this two figures have and the differences that may exist between them.

## **1. HISTORICAL BACKGROUND OF THE FIDEICOMISO**

During the course of history, the right to own property has always been extremely important for man; even though in different periods and for different circumstances it has been limited in one way or another, it has prevailed throughout history and men have always found a way to create new institutions to have the right to own and dispose of their assets freely.

The *fideicomiso*<sup>2</sup> has prevailed since ancient times, in spite of all the changes and modifications throughout its existence. This constant evolution has been possible “as this figure has responded to the necessities that arise from the free disposition of one person’s assets”<sup>3</sup>.

The term *fideicomiso* comes from the Latin word *fideicommissum*: *fides*: trust and *comissum*: to commit. The most ancient origins of the *fideicomiso* can be found in the Roman law.

### **1.1. The Roman fideicomiso**

During Roman times, several restrictions imposed by law limited the free disposition to inherit. Some persons were excluded from inheriting, such as slaves, foreigners, women etc. As a result of these legal restrictions, the Roman law gave birth to two figures, which are the predecessors of the roman *fideicomiso*: the *fiducia* and the testamentary *fideicomiso*.

#### **1.1.1. The fiducia**

The *fiducia* was accepted as a formal transfer of property (*mancipatio*) made with the obligation of the transferee to give back the property to the transferor or to a third party<sup>4</sup>,

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<sup>2</sup> The *fideicomiso* is considered as an institution to freely dispose of a person’s assets. No translation of this term will be made throughout this document in order to avoid any confusion.

<sup>3</sup> BERG-SERRAN DE MASSIS Maria Eugenia, *El Fideicomiso, su desarrollo y aplicación en el mundo moderno*, Tesis de Magister Artium en Ciencias Sociales, Universidad Francisco Marroquin, Escuela Superior de Estudios Sociales, Guatemala august 1993, p.5, [www.tesis.ufm.edu.gt/pdf/930.pdf](http://www.tesis.ufm.edu.gt/pdf/930.pdf)

<sup>4</sup> VILLAGORDOA LOZANO José Manuel, *Doctrina General del Fideicomiso*, 4th edition, Porrúa, México 2003, p.2

after the accomplishment of specific purposes, previously agreed by the parties.

“In its origin the *fiducia* was a very informal relationship where the transferor of the property had no guaranty in the event the transferee or creditor acted in bad faith”<sup>5</sup>.

There were two types of *fiducia*:

- a) ***Fiducia cum creditore***: its purpose was to guarantee the performance of an obligation. The debtor transferred property to the creditor in order to guarantee his debt, while the creditor committed to give back the property to the debtor, once the latter paid his debt.
  
- b) ***Fiducia cum amico***: the owner transferred the property to a person he trusted, “for him to use and enjoy gratuitously and in his own benefit. Once these purposes were accomplished, the transferee had to return the property to the transferor”<sup>6</sup>. The owner retained his interest in the property at all times.

### 1.1.2. Testamentary fideicomiso

As a response to the restrictions to inherit mentioned above, a person who wished to transfer property to a legally incapable beneficiary, instead of doing it directly, which was legally impossible, would designate a legally capable person as his heir and entrust him that after his death (the testator’s), he would convey the whole or part of his inheritance to the “legally incapable” real beneficiary (A appoints B as his heir (fiduciary) entrusted with passing the inheritance to C (beneficiary)); “there was a division between title and interest on the property transferred under a *fiducia*”<sup>7</sup>.

The fiduciary became the “heir” of the testator and it was up to his personal principles to perform this obligation properly. “The testator had no guaranty except for the honesty and

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<sup>5</sup> RODRÍGUEZ RUIZ Raúl, *El Fideicomiso y la Organización Contable Fiduciaria*, Ediciones Contables y Administrativas, S.A., México 1977, p. 27, quoted by WUNDERLICH GUMPEL, Op. cit., p.6

<sup>6</sup> VILLAGORDA, Op. cit., p.3

<sup>7</sup> CH. Van Ree, *Trusts, trust-like concepts and ius commune*, European Review of Private Law, 3/2000, n.p, <http://arno.unimaas.nl/show.cgi?fid=969>

loyalty of the person to whom he entrusted the property”<sup>8</sup>. By means of this figure, the testator could convey property to a person who was prevented by law to inherit.

The figure of the *fideicommissum* arose as a result of the confidence (trust) that a person had in a third party<sup>9</sup>. With time, some people started to use the *fideicomiso* for illegal purposes, creating them in a tacit way. Therefore, the secret *fideicomiso* was then forbidden.

The fiduciaries some times failed to execute their obligation so, in order to avoid fraud<sup>10</sup>, the emperor created the figure of the *pretor fideicommissarius*; giving it the faculty to force the “heir” to accomplish the obligations entrusted to him.

Later on, the beneficiary’s substitution (“*sustitución fideicomisaria*”)<sup>11</sup> came to life “with the purpose of transferring property from one person to another successively, after each beneficiary’s death”<sup>12</sup>. This institution is different to the *fideicomiso*, as (i) it was created only to protect the family’s wealth; (ii) the transmission of property took place only upon the fiduciary’s death<sup>13</sup>; and (iii) in the beneficiary’s substitution there was no right to alienate the property. The beneficiary’s substitution had an important popularity until the Napoleonic Code banned it, in response to the concentration of wealth in a few hands.

These two institutions, the *fiducia* and the testamentary *fideicomiso*, are deemed to be the most ancient antecedents of the Mexican *fideicomiso*.

## **1.2. The *fideicomiso* in German Law**

According to Villagordoa, there are three institutions which are antecedents of the *fideicomiso* in German law:

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<sup>8</sup> BERG-SERRAN DE MASSIS, Op. cit., p.7

<sup>9</sup> RODRIGUEZ RUIZ, Op. cit., p.27, quoted by WUNDERLICH GUMPEL, Op. cit., p.5

<sup>10</sup> BERG-SERRAN DE MASSIS, Op. cit., p.8

<sup>11</sup> In the beneficiary’s substitution, the testator designates a direct heir and one or more substituted heirs and orders the fiduciary to enjoy and preserve the inheritance until the fiduciary’s death, when it will pass to the substituted heirs. This institution has always been forbidden in México, according to Villagordoa in *Doctrina General del Fideicomiso*, p. 5

<sup>12</sup> BERG-SERRAN DE MASSIS, Op. cit., p.10

<sup>13</sup> In the *fideicomiso* the transfer takes place immediately or at a fixed term.

### 1.2.1. Real estate pledge

Through this institution, the debtor transferred to his creditor a real estate property in order to guarantee his debt. The creditor was bound to return the property and signed a letter confirming his commitments to return the property to the debtor, once the latter had paid his debt.

“This institution was only valid for collaterals established on real estate property”<sup>14</sup>.

### 1.2.2. Manusfidelis

This institution was very important for inheritance purposes since, as in Roman law, German law considered some limitations concerning the heirs. It consisted on “the transmission of the asset to a fiduciary called *manusfidelis* by means of a letter (called *venditionis*). Immediately after the transmission, the *manusfidelis* re-transmitted the assets acquired to the real beneficiaries, reserving for the donor the right to enjoy the asset donated during the donor’s life”<sup>15</sup>.

### 1.2.3. Salman or Treuhand

These are the persons who carried out the role of the fiduciary. German law has defined it as the intermediary person, through whom the transmission of a real estate asset is made.

C.H. van Rhee explained it as follows: “a person, *salmannus*, is charged with administering property in the interest of another person or for a designated purpose. He does not administer the property for his personal interest”<sup>16</sup>. He receives his faculties from the transferor “and at the same time, he assumes his obligation before him”<sup>17</sup>.

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<sup>14</sup> VILLAGORDOA, Op. cit., p.5

<sup>15</sup> Idem., p.6

<sup>16</sup> CH. Van Ree, Op. cit., n.p.

<sup>17</sup> MESSINA Giuseppe, *Negozi Fiduciari, Scritti Giuridici*, Milano 1948, Vol. 1, p.151, quoted by VILLAGORDOA, Op. cit., p.6

### 1.3. The fideicomiso in English Law (Trusts)

Trusts did not come to life unexpectedly; they were subject to various stages before they came to be what they are today. The Trust is an institution that has been used for many years; it is thought that it has its roots in the medieval times.

Its origin is very closely linked to the institution of “use.” In the Middle Ages there were many restrictions to transfer land by will and “this gave birth, during the 13th Century, to the institution known as use”<sup>18</sup>. “The use consisted of the transmission of land made by will or *inter vivos* in favour of a person (front man), who owned the land on behalf of the beneficiary or *cestui que use*”<sup>19</sup>. This institution “appeared in England as a consequence of the medieval common practice to deliver assets, mainly real estate (...) by transferring the control to a person (*feoffee to uses*), for him to administer it for the benefit of another person (*cestui que use*)”<sup>20</sup>. For example: One wishes to give to A the enjoyment of a real estate property, this could be possible by means of a *feoffment*, in which B would be invested with the right of property in the real estate (to use), but the profit of such property would be attributed to A. Sometimes the *feoffee to uses* did not accomplish his obligations towards the beneficiaries. This was a problem since the beneficiaries had no property rights in the trust assets. By taking advantage of the use, some feudal taxes on property were avoided, so “the use can be regarded as an early tax-avoidance scheme”<sup>21</sup>.

The use was also used in some fraudulent practices such as “the transfers in use, in order to defraud the creditors”<sup>22</sup>, (...) avoid restitution claims and (...) the evasion of the status *mortmain*<sup>23</sup>; which allowed the donation of land to the church foundations”<sup>24</sup>. These fraudulent practices were restrained during Edward III’s reign.

As the use gave birth to many difficulties, such as fraudulent uses and abuses; in 1535 the

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<sup>18</sup> WUNDERLICH GUMPEL, Op. cit., p.7

<sup>19</sup> MAITLAND, F.W, *Equity A Course of Lecture*, Revised and Annotated by John Brunyate, Cambridge University Press, 1949, p.23, quoted by BATIZA Rodolfo, *El fideicomiso: teoría y práctica*, 5th edition, Jus, Mexico 1991, p.33

<sup>20</sup> BATIZA, *Tres estudios sobre el fideicomiso*, Instituto de derecho comprado, Imprenta Universitaria, México 1954, p.36, [www.info5.juridicas.unam.mx/libros/libro.htm?l=800](http://www.info5.juridicas.unam.mx/libros/libro.htm?l=800)

<sup>21</sup> WATT Gary, *Trusts and Equity*, Oxford University Press, Oxford 2003, p.9

<sup>22</sup> The debtor transferred his assets to a fiduciary, in order for such fiduciary to own them in his own benefit; it was seen as if the debtor was insolvent.

<sup>23</sup> As the church owned very big extensions of land, the Parliament created the Statute of Dead Hands; by which it was forbidden for the church foundations or corporations to acquire the property of the land were they lived.

<sup>24</sup> BATIZA, *El Fideicomiso: teoría y práctica*, Op. cit., p.34

Statute of Uses was created to regulate this institution. “The effect of the statute was to transfer legal title (“equitable”) to the beneficiary of the use (*cestui que use*)”<sup>25</sup> and to recognize the application of the use. This was the first attempt to attribute the beneficiary with some rights, which were not full rights on property.

“Whoever enjoyed from a use would be considered as the legal owner of the assets”<sup>26</sup>. The Courts recognized the *feoffee to uses* as the legal owner of the property and no full right on property was recognized on the *cestui que use* or beneficiary. As a result of this, the Courts of Equity were created, and it is this Court who recognized for the first time an equitable title on the property in favour of the beneficiary.

The creation of the Courts of Equity gave as a result that two legal systems, Common Law and Equity<sup>27</sup> (each with its own Court), “gave faculties in one and the same thing to two different persons (trustee and beneficiaries). This situation is known as the division or unfoldment of property, which is the most relevant characteristic of the Trust”<sup>28</sup>. “The separation of legal and equitable title will always produce a Trust in English law”<sup>29</sup>.

The Courts of Equity created the concept of equitable property, vested in the beneficiary so he could obligate the trustee to perform his obligations. As a result, the trustee had the legal ownership of the property and the beneficiaries had the equitable ownership. By means of this, abuses from the trustees were limited or reduced. “Whatever the explanation of how and why the beneficiary’s mere personal right against a particular defendant became a property right in the trust asset, it is now clear that when the absolute owner of an asset transfers it to trustees on express trust for certain beneficiaries, the effect is to vest legal title to the property in the trustees and equitable title (equitable or beneficial ownership) in the beneficiaries”<sup>30</sup>.

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<sup>25</sup> WATT, Op. cit., p.9

<sup>26</sup> BERG-SERRAN DE MASSIS, Op. cit., p.15

<sup>27</sup> WATT, Op. cit., p. 11. Equity is a body of principles, doctrines and rules developed originally by the old Court of Chancery in constructive competition with the rules, doctrines, and principles of the Common Law Courts (...) now applied by the Supreme Court of England and Wales. The reason why the rules of equity arose was to deal with situations in which the common law was unable to give relief due to a temporary paralysis.

<sup>28</sup> HERNÁNDEZ DOMÍNGUEZ Joel, *Comparación entre el Fideicomiso y el Trust Angloamericano*, Universidad Iberoamericana de León, México, p.3 [www.leon.uia.mx/Epikoa/numeros/08/EPIKEIA08-%20E1%Fideicomiso.pdf](http://www.leon.uia.mx/Epikoa/numeros/08/EPIKEIA08-%20E1%Fideicomiso.pdf)

<sup>29</sup> WATT, Op. cit., p.33

<sup>30</sup> Idem., p.11

Given that the Mexican *Fideicomiso* was created based on the institution of Trusts, I will dedicate a special chapter to explain this figure, as I consider it relevant to explain extensively<sup>31</sup>.

#### **1.4. Historical Background of *Fideicomiso* in Mexico**

There are no records of the existence of the *fideicomiso* in Mexico before the 20<sup>th</sup> Century. Before this date, the only known purpose of the *fideicomiso* was to perpetuate an inheritance. However, this institution was not regulated. The *fideicomiso* began to be of importance and consideration at the beginning of the 20<sup>th</sup> century.

“Given that in Mexico we could only find the *fideicomiso* related to testamentary dispositions, the legislators had to import the Anglo-Saxon Trust in a restricted way, as only the express trust was adopted by our legal regime”<sup>32</sup>.

The first record of the Mexican *fideicomiso* is a Trust that was created in the United States, at the beginning of the 20<sup>th</sup> Century, to “guarantee the issue of bonds or obligations which aimed to fund the construction of trains of the Mexican Railway Company”<sup>33</sup>. This particular Trust did not have an impact on the future legal recognition of the Mexican *fideicomiso*, but it was the first trust effective on Mexican territory.

Afterwards, the legislators decided to try and adapt the Anglo – Saxon Trust to the Mexican Law. As a result, there were many projects of acts that tried to establish the *fideicomiso* in the legislation. The first of these attempts took place in 1905 with the Limantour Project, which was the very first one to adapt the Trust to a Roman law system. The second attempt was in 1924 with the Creel Project, which was based on the functioning of the “American Trusts and Saving Banks”<sup>34</sup>. In 1924 the LGICEB was created and this second project had an effective influence on the first official regulation of the Mexican *fideicomiso*. The third attempt, in 1926, was the Vera Estañol Project, which

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<sup>31</sup> See Chapter 2.

<sup>32</sup> VILLAGORDOA, Op. cit., p.p.44 and 45

<sup>33</sup> BATIZA Rodolfo, *Fideicomiso teoría y practica*, 2nd edition; Asociación de Banqueros de México, México DF 1973, p.83, quoted by PIÑA MEDINA Jorge and ACOSTA ROMERO Miguel, *Las Instituciones fiduciarias y el fideicomiso en México*, Banco Mexicano Sofomex, S.A., México DF 1982., p.28

<sup>34</sup> BATIZA, Op. cit., p.106

was very similar to that of 1905. As mentioned before, only the Creel project had an influence on the *fideicomiso's* regulations; the other projects are only considered as an attempt to regulate the institution.

The LGICEB was the first to introduce the *fideicomiso* in the Mexican law. Later on, other laws were issued<sup>35</sup>, influenced by the concepts from the Panamanian jurist Ricardo J. Alfaro; who defined the *fideicomiso* as an irrevocable mandate by means of which specific assets were delivered to a bank, as fiduciary, for him to dispose according to the will of the person that gave them to him, called *fideicomitente*, for the benefit of a third person called *fideicomisario*<sup>36</sup>.

Finally, in 1932, the LTOC substituted the 1926's LGICEB but kept the principles established on the 1926 Law. This new Act foresaw the revocation of the *fideicomiso*<sup>37</sup>, which was not previously allowed. Throughout time, the dispositions of this Law, concerning the *fideicomiso*, have been subject to several modifications both “on its substance and on its tax treatment”<sup>38</sup>. The last of these modifications was made on 2003.

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<sup>35</sup> Such as the “Law of Banks of Fideicomiso” which established in a more specific way the structure of the Mexican *fideicomiso*, and the 1926 LGICEB.

<sup>36</sup> VILLAGORDOA, Op. cit., p.46

<sup>37</sup> For this to be possible, the *fideicomitente* has to reserve for himself the power to revoke it, at the moment of the constitution of the *fideicomiso*.

<sup>38</sup> DOMÍNGUEZ MARTÍNEZ Jorge Alfredo, *El fideicomiso de antes y ahora*, Porrúa, México 2008, p.16

## 2. TRUSTS

### 2.1. Definition and Characteristics

There have been many attempts to give a satisfactory definition of Trusts<sup>39</sup>. This has not been easy, since this institution is very flexible and can be used for various purposes. Many authors have tried to outline the right definition. Some prefer a very simple one, such as Professor Powell (quoted by Rodolfo Batiza) “the idea of a trust is essentially simple: in accordance with it, a person holds as an owner and administers certain assets for another person’s economical benefit”<sup>40</sup>.

On the other hand, a more detailed definition of a Trust is that of Sir Arthur Underhill who defines a trust as “an equitable obligation binding a person, called trustee, to deal with property owned by him, called trust property (being distinguished from his private property), for the benefit of a third party(ies), called beneficiaries or, in old cases, *cestuis que trust*, of whom he may himself be one; and any one of whom may enforce the obligation”. “A trust is a legal device which contains elements both of the law of obligations and of the law of property”<sup>41</sup>.

Through these definitions one may conclude that Trusts are enforced by equity rather than by common law. The latter only recognizes rights of property on the legal owner of the property and therefore, it will not recognize the equitable ownership of the beneficiaries. By means of a Trust, the beneficiaries have rights to or over the property held in Trust for their benefit (equitable ownership), even though they do not have the legal title in the property. The trustee has an equitable duty to compel with his obligations. Even though it is not mandatory, the trustee’s obligations, together with the beneficiaries rights (in some cases), are often clearly outlined in a trust instrument.

An example of a Trust can be the case where a father who wants to make provisions for his

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<sup>39</sup> The word trust can have a lot of meanings, the meaning in which we are interested is that of confidence, faith or believe in the goodness of another person.

<sup>40</sup> BATIZA, *Tres estudios sobre el fideicomiso*, Op. cit., p.31

<sup>41</sup> PENNER James and SWADLING William, *The law of trusts*, University of London 2007, p.7,

[www.londonexternal.ac.uk/current\\_students/programme\\_resources/laws/subject\\_guides/law\\_trusts\\_chs1to4.pdf](http://www.londonexternal.ac.uk/current_students/programme_resources/laws/subject_guides/law_trusts_chs1to4.pdf)

children in the event of his death, transfers property in trust to another person with the instructions that the property is to be used for the benefit of his children.

### **2.1.1. Parties to a Trust:**

a) **Settlor:** is the person that creates the Trust and must be legally capable. Once the creation of the Trust has taken place, the settlor has no further role in the Trust. He can declare himself as one of the trustees or the only trustee and he can also be one of the beneficiaries of the Trust<sup>42</sup>.

The settlor is required to demonstrate an intention to create the trust, to identify the property subject to Trust, and to designate the beneficiaries of that property. The trust instrument could be most useful for these purposes. The settlor cannot interfere in the Trust once it has been created, unless he has reserved for himself a specific authority as trustee or as a beneficiary.

b) **Trustee:** is the person to whom the property is conveyed to be held in trust for the beneficiaries. “In order to be a trustee, a person must have the capacity to acquire and possess the property of the assets in trust (...) and to administer them according to the trust instrument”<sup>43</sup>. The trustee must “have natural and legal capacity”<sup>44</sup>, in order to be capable to retain the legal title on the assets and to be able to perform the Trust. A trustee can be either an individual or a legal entity.

Even though the trustee is the legal owner of the property, the trust property (or funds) is deemed to be separate from the trustee’s personal property. The trustee represents and acts on behalf of the Trust and has fiduciary and good management obligations to comply with, in order to protect the beneficiaries’ rights under the Trust. The trustee has to do what is best for the beneficiaries.

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<sup>42</sup> Exception: these capacities could fall on the same person if someone else, in addition to the settlor, is a beneficiary.

<sup>43</sup> LEWIN Thomas, *Lewin on Trusts*, 16th Edition by W.J. Mowbray, Sweet & Maxwell, Ltd. London 1950, p.24, quoted by BATIZA, *El fideicomiso: teoría y práctica*, Op. cit., p.55

<sup>44</sup> Idem.

If the trustee breaches any of its obligations (established by law or by the trust instrument) he will be held liable for breach of Trust.

c) **Beneficiary(ies)**: the person or persons for whose benefit the property is held in Trust, and who have an equitable interest in the trust fund. The law establishes no restrictions as of who can be a beneficiary to a Trust.

The beneficiaries have rights in *rem*, which means they have rights on the trust property and rights in *personam*; or in other words, they have rights against the trustee in case he commits a breach of Trust.

It is possible for the same person to be both settlor and trustee, or trustee and beneficiary; however, these three capacities should not be on the same person<sup>45</sup>. For a further explanation please refer to Schedule 1.

### 2.1.2. **The three certainties**

For a Trust to be valid there must be:

a) **Certainty of words or intention**: this means that the settlor has shown an intention to create a Trust. It is not necessary that the word “Trust” appears in the document or in the settlor’s mind, but we need to be sure that the intention of the settlor was to create a Trust. “Where there is no certainty of intention, the person entitled to the property will take (it) absolutely”<sup>46</sup>.

b) **Certainty of subject matter**: this is the trust property; it must be certain and clear to which property we are referring to. “Thus a declaration concerning “the bulk of my estate” will be ineffective to create a Trust (Palmer v Simmonds 1854)”<sup>47</sup>; it must be clear what will be subject to the Trust for the benefit of the beneficiaries.

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<sup>45</sup> See quotation no.43

<sup>46</sup> SYDENHAM Angela, *Trusts in a nutshell*, Sweet and Maxwell, London 1997, p.7

<sup>47</sup> *Idem.*, p.8

c) **Certainty of objects:** this is the beneficiaries of a Trust and they must also be certain. They must be fully identified or identifiable. “If they (beneficiaries)<sup>48</sup> are not, but the other two certainties are present, there will be a resulting Trust for the settlor or his estate”<sup>49</sup>. “The class which is to benefit must be certain”<sup>50</sup>. E.g. “brothers and sisters of the settlor” is certain, “those who have helped me” is not certain.

## 2.2. Types of Trusts

We could write entire pages about types of Trusts according to theory and practice, but since this work is focused on the Mexican *fideicomiso* and not Trusts, I will mention a simple classification of Trusts, which is relevant for our main subject and at the same time, may include most types of Trusts.

It is also important to mention that the purpose of the Trust will also classify the Trust as one type or another, e.g. Purpose Trust, Qualified Domestic Trust, Charitable Trust, etc.

**2.2.1. Express Trusts:** created intentionally by the settlor himself (usually created by will -testamentary Trust- or by deed), by entrusting certain property and/or rights to the trustee for him to accomplish a certain purpose, previously established by the settlor; and to transfer such property to a beneficiary. The settlor can declare himself as trustee or appoint some other person(s) as trustee(s) of the property, for the benefit of the beneficiaries. There are different kinds of express Trusts, e.g. bare Trusts<sup>51</sup>, fixed Trusts<sup>52</sup> etc.

According to the extent of the powers granted to the trustee or those reserved by the settlor, the Trust might be: revocable, irrevocable, discretionary and fixed.

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<sup>48</sup> What is mentioned in parenthesis is not part of the quotation.

<sup>49</sup> SYDENHAM, Op. cit., p.8

<sup>50</sup> Idem., p.9

<sup>51</sup> Arises when the trustee(s) holds property in Trust for a single beneficiary. They only have the obligation to administer the Trust property on behalf of the beneficiary.

<sup>52</sup> The trustees hold property on Trust for a certain list of beneficiaries. The trustees have no discretion neither regarding the beneficiaries nor the interests assigned to each of them.

**2.2.2. Trusts arising by operation of law:** There are certain circumstances that cause a Court to impose the inception of a Trust. There is no intention of the settlor to create the Trust. These Trusts can be classified as follows:

**a) Implied Trusts:** “Where the court infers an intention to create a Trust from the circumstances of the transaction and the conduct of the parties”<sup>53</sup>. For example: a person who has a bank account declares that the contents of that bank account were to be considered of the property of both, himself and his partner. The Court may interpret that this is a Trust even if the word Trust was never used and the settlor did not know that his actions had as consequence the creation of a Trust<sup>54</sup>.

**b) Constructive Trusts:** “It means a Trust which is (...) constructed by the Court rather than by an individual right-holder through a declaration of Trust”<sup>55</sup>. Such Trusts do not arise because of the express intent of the settlor; they are created by a Court whenever title to property is held by a person who, in fairness, should not be permitted to retain it.

**c) Resulting Trusts:** “Is one which arises in favour of the transferor of rights”<sup>56</sup>. This is the case when the trust funds (totally or partially) of an express Trust, result back for the benefit of the settlor. “For example if the settlor gives property on Trust to be invested with a direction to pay, say £1,000 a year out of the income to a beneficiary and in some years the income exceeds £1,000, there is said to be a resulting trust of the surplus for the benefit of the settlor himself”<sup>57</sup>.

**2.2.3. Private Trusts:** A private Trust is one which is created for the benefit of a specific person(s). “Such a trust can be enforced at the instance of any of the beneficiaries”<sup>58</sup>.

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<sup>53</sup> CII Tuition Service, *General Principles of English Law*, The Chartered Insurance Institute, Tuition Service, Willmer Brothers Limited, England, p.98

<sup>54</sup> Paul v Constance [1977] 1 WRL 527, [http://www.Kevinboone.com/lawglos\\_PaulVConstance1976.html](http://www.Kevinboone.com/lawglos_PaulVConstance1976.html)

<sup>55</sup> PENNER and SWADLING, Op. cit., p.33

<sup>56</sup> Idem., p.36

<sup>57</sup> CII Tuition Service, Op. cit., p.98

<sup>58</sup> Idem., p.99

**2.2.4. Public Trusts:** A public Trust is one which benefits the public at large. Most of public trusts are known as “Charitable Trusts”<sup>59</sup>.

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<sup>59</sup> For a Trust to be a Charitable one, it has to have as target one of the following purposes: (i) the relief of poverty; (ii) the advancement of education; (iii) the advancement of religion; (iv) other purposes beneficial to the community

### **3. LEGAL NATURE, DEFINITION AND ELEMENTS OF THE MEXICAN FIDEICOMISO**

#### **3.1. Legal nature**

Given that the law does not give a definition of the *fideicomiso*, its legal nature has been subject to various discussions. There have been many attempts to establish its legal nature. The doctrine generally accepts either the theory of the *fideicomiso* as a fiduciary transaction<sup>60</sup> or as a legal transaction. From these attempts, we can infer from what most of the authors say that it is an agreement, a contract. We can confirm this given that, at the time of the incorporation of the *fideicomiso* (creation of the agreement), it is always mentioned that it is an agreement and it is constituted in an agreement.

The fiduciary transaction arises from two different relationships: a real one (transfer of the property) and an obligatory one (the obligation of the fiduciary to use the right he acquired through the fiduciary transaction in a certain and specific way)<sup>61</sup>. A fiduciary transaction is “(...) that through which a person transfers the whole or part of certain assets or rights to another person (real relationship)<sup>62</sup>, who at the same time accepts the obligation (obligatory relationship)<sup>63</sup> to reserve such assets or rights to a licit and specific purpose and, eventually, transfer them to a third party or return them to the original transferor”<sup>64</sup>.

A legal transaction is formed by two or more declarations of intent destined to a specific purpose (which cannot be contrary to law) and by means of which “the person who makes it wants to create, modify or extinguish a right or a legal relationship”<sup>65</sup>.

Some legislators and academics consider the *fideicomiso* as a fiduciary transaction and others as an agreement or legal transaction. We consider that the *fideicomiso* is a fiduciary legal transaction, since it contains elements of both, the legal and the fiduciary transaction;

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<sup>60</sup> The fiduciary transaction is a sort of legal transaction.

<sup>61</sup> Direct Writ of Amparo, 1627/60, Hermenegildo Moreno González, August 24th 1960, Mayoría de tres votos, Ponente: Gabriel García Rojas.

<sup>62</sup> Not part of the quotation.

<sup>63</sup> Not part of the quotation.

<sup>64</sup> BARRERA GRAFF Jorge, *Estudios del derecho mercantil*, Primera Edición, México, 1958, p.317, quoted by DE PINA VARA Rafael, *Derecho Mercantil Mexicano*, 27th edition, Porrúa, México 2000, p.369

<sup>65</sup> CABALLERAS Guillermo et al, *Diccionario enciclopédico de derecho*, Vol. IV-J-0 12a edición, Editorial Heliasta, S.R.L., p.535, quoted by PIÑA MEDINA and ACOSTA ROMERO, Op. cit., p.129

it is created by the intention of the *fideicomitente* and the acceptance of the fiduciary (art. 382 pr. 4 LTOC) with the obligation of the latter to act in accordance with the intention of the *fideicomitente* (these are the above mentioned declarations of intent). In addition, the fiduciary has to reserve the assets or rights to a specific purpose established at the time of the constitution of the *fideicomiso*. The *fideicomiso* is an agreement which “has transferring effects on the property of the *fideicomiso*’s assets”<sup>66</sup>.

“The *fideicomitente* constitutes a fiduciary and autonomous patrimony, whose legal ownership is given to the fiduciary institution for it to carry out a specific purpose”<sup>67</sup>. In line with the above, the legal owner of the assets or rights is the fiduciary; he is the legal owner before any third party (art. 388 and 389 LTOC). This quality of legal owner is only temporary since he has to accomplish the *fideicomitente*’s wishes. “The transfer made to the fiduciary is not an absolute one, since the fiduciary cannot dispose of the rights or assets transferred to him on his own benefit”<sup>68</sup>. “It can be said that the fiduciary is the titleholder of the assets received in *fideicomiso*, but not the economical owner”<sup>69</sup>.

“The basic principles upon which a *fideicomiso* is regulated in Mexico are that it is not a legal entity, but rather an entity created by a contract, and its transparency permits it to be viewed as a transparent conduit”<sup>70</sup>.

### **3.2. Definition**

According to De Pina Vara, the *fideicomiso* is a “legal transaction by means of which a person (an individual or an entity), called *fideicomitente*, transfers certain assets or rights to a fiduciary institution for it to perform a legal and specific purpose; entrusting her with the

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<sup>66</sup> SUAYFETA OZAETA Juan, *La institución jurídica del fideicomiso en caída libre. En proceso nuevas reformas a las leyes que lo regulan*, Revista de derecho privado, nueva época, año II, no. 6, September-December 2003, p.85, [www.juridicas.unam.mx/publica/librev/rev/derpriv/cont/6/dtr/dtr4.pdf](http://www.juridicas.unam.mx/publica/librev/rev/derpriv/cont/6/dtr/dtr4.pdf)

<sup>67</sup> Writ of Amparo in review 769/84, Unitas, S.A. de C.V., August 26th 1986, Mayoría de diecisiete votos, Disidentes: Mariano Azuela Guiaron, Atanasio González Martínez y Ulises Schmill Ordóñez, Ponente: Felipe López Contreras, Secretario: Diego Isaac Segovia Aráosla.

<sup>68</sup> VILLAGORDOA, Op. cit., p.73. We call this a *titularidad fiduciaria* (fiduciary ownership), since those rights and assets are reserved for the *fideicomiso*.

<sup>69</sup> RODRÍGUEZ Y RODRÍGUEZ, Joaquín, *Curso de Derecho Mercantil*, México, 1947, pp.196 and 198, quoted by VILLAGORDOA, Op. cit., p.101

<sup>70</sup> Law in Context, Tax Planning with trusts-Mexico, November 20, 2008 [www.lawincontext.com/Linxdev/ContentCountryTopicSubTopic.aspx?offid=2](http://www.lawincontext.com/Linxdev/ContentCountryTopicSubTopic.aspx?offid=2)

fulfilment of that purpose. The fiduciary institution becomes the titleholder of the (...) assets and/or rights”<sup>71</sup>.

The first time the definition of *fideicomiso* was included in the Mexican law (1926), it was described as an “irrevocable mandate by means of which specific assets are delivered to a bank, as fiduciary, for him to dispose, according to the intention of the person who gave them to him (called *fideicomitente*), for the benefit of a third party or beneficiary, called *fideicomisario* or beneficiary”<sup>72</sup>. Later on, this definition was modified, and the *fideicomiso* was no longer considered as an irrevocable mandate but as a contract. This change triggered several consequences.

The current legislation does not give a definition of the *fideicomiso*; it only describes the way in which it should operate. In the new dispositions of the law, we find that the legislators decided to modify the definition set on the 1926 Law, by saying that for the *fideicomiso* to be able to fulfil its purposes, the transfer of the assets to the fiduciary was necessary<sup>73</sup> instead of the simple “delivery” of assets, previously required. Article 381 LTOC establishes that, by means of the *fideicomiso*, the *fideicomitente* transfers the property or title ownership of one or more rights or assets to a fiduciary institution for them to be destined for legal and specific purposes; entrusting the execution of that purpose to the fiduciary institution.

### **3.3. Characteristics**

As mentioned before, the fiduciary is the titleholder of the *fideicomiso*'s assets and/or rights. “The exercise of the rights transferred to the fiduciary turn into an obligation on his charge and in favour of the *fideicomisario* (...)”<sup>74</sup>. The assets and rights that are the subject matter of the *fideicomiso* constitute an autonomous patrimony. This means they are not part of any of the parties' assets and they are reserved to a certain purpose “under the

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<sup>71</sup> DE PINA VARA, Op. cit., p.369. We can find in the jurisprudence that jurists define the *fideicomiso* as “a legal transaction, by means of which the *fideicomitente* constitutes an autonomous and fiduciary patrimony, whose ownership is given to the fiduciary institution, for the fulfilment of a specific purpose”. (Direct Writ of Amparo 5567/74, 1979)

<sup>72</sup> MONSERRIT ORTIZ SOLTERO Sergio, *El fideicomiso mexicano*, 3rd edition, Porrúa, México 2006, p.7

<sup>73</sup> In the mandate there is no transfer of title.

<sup>74</sup> RODRÍGUEZ Y RODRÍGUEZ, Op.cit., p.119, and BARRERA GRAFF, Op.cit., p. 439, quoted by VILLAGORDOA, Op. cit., p.142

ownership and execution of the fiduciary”<sup>75</sup>. Even if the fiduciary has the property of the assets or rights in *fideicomiso*, this is only a fiduciary property and he does not have any enjoyment rights on them; he has to use them for the fulfilment of the purposes for which he was instructed by the *fideicomitente*.

In the *fideicomiso*, all kind of assets (as long as they are in commerce) and rights (as long as they are not strictly personal of their legal owner) can be transferred and must be destined to the purpose for which they have been reserved; and only the rights and actions related to that purpose can be exercised<sup>76</sup>. Since those rights transferred by means of a *fideicomiso* are an autonomous patrimony and are not part of the fiduciary institution’s assets, they have to be registered separately from the fiduciary institution’s assets (art.386 LTOC).

In relation with the above, in case of bankruptcy of the fiduciary institution, the assets and/or rights held in *fideicomiso* will not be part of the bankruptcy estate; since they are not part of the fiduciary’s assets and only the rights and actions related to the purpose of the *fideicomiso* can be exercised. Moreover, such autonomous patrimony, “(...) can be declared in bankruptcy by its creditors, without this implying or causing the bankruptcy of the fiduciary”<sup>77</sup>. Notwithstanding the above mentioned, “the net assets of the *fideicomiso* are not assets without titleholder. The title ownership corresponds (as above mentioned) to the fiduciary, according to the terms and conditions established at the moment in which the *fideicomiso* was constituted”<sup>78</sup>. Even though the titleholder of the *fideicomiso* is the fiduciary, there are some cases in which he will not be seen as the owner of those assets or rights<sup>79</sup>.

The *fideicomiso* may also be considered as a clause in favour of a third party. The CC<sup>80</sup> establishes the possibility for an individual or an entity to create a benefit or a right in favour of a third party. These articles give the right to the third party to demand from the

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<sup>75</sup> Direct writ of Amparo 5567/74, Banco Internacional Inmobiliario, S.A., June 15<sup>th</sup> 1979, Mayoría de tres votos, Ponente: José Alfonso Abitia Arzapalo, Secretario: José Guillermo Iriarte Gómez.

<sup>76</sup> Art. 386 LTOC

<sup>77</sup> RODRÍGUEZ Y RODRÍGUEZ, *La separación de los bienes en la quiebra*, Imprenta Universitaria, México 1951, p.209, quoted by VILLAGORDOA, Op. cit., p.145

<sup>78</sup> VILLAGORDOA, Op. cit, p.144

<sup>79</sup> An example of this is when the fiduciary only has the right of enjoyment (usufruct) on certain assets.

<sup>80</sup> Art. 1868 and 1869 CC

promissor the consideration to which he obliged himself before the person creating the “clause”. We can say that the *fideicomisario* (beneficiary of the *fideicomiso*) can demand from the fiduciary (promissor) the consideration to which he obliged himself and also “has the right to demand the performance of that obligation”<sup>81</sup>. Article 390 LTOC establishes as a right of the *fideicomisario*, to demand the performance of the *fideicomiso* from the fiduciary institution. These two legal dispositions are equivalent in their contents in spite of being part of two different regulations.

The *fideicomitente* (settlor) relinquishes the ownership rights on the assets or rights affected to the *fideicomiso* in favour of the fiduciary, but continues to be the owner of the assets<sup>82</sup>. The fiduciary has the legal-title on the assets and/or rights but only for a period of time, where “he has to exercise all the rights and actions to accomplish the purposes of the *fideicomiso*, and he must act as a paterfamilias would”<sup>83</sup>.

The assets and/or rights must be intended for a legal (in accordance with the public order and common uses) and certain (specific and not general)<sup>84</sup> purpose.

Another important characteristic of the *fideicomiso*, as we mentioned before, is that the Mexican Law only allows express *fideicomisos* (art. 387 LTOC); being that they can only be created upon the express consent of the *fideicomitente* and the transfer of some of his assets and/or rights. Besides, for its creation, all the rights and/or assets given in *fideicomiso* must follow all the formalities of the transmission of property (before notary public, formalized in a public instrument, in a private document, etc).

When real estate property is involved, the *fideicomiso* has to be registered in the PRREP and will become effective as of registration (art. 388 LTOC), in this case, it is the fiduciary who appears as the titleholder of the assets. In the case of movable assets, the Law establishes three different circumstances in which the *fideicomiso* will become effective

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<sup>81</sup> VILLAGORDOA LOZANO, Op. cit., p.183

<sup>82</sup> DOMÍNGUEZ MARTÍNEZ, *Dos aspectos de la esencia del fideicomiso mexicano (acto constitutivo unilateral y propiedad conservada por el fideicomitente con la titularidad del fiduciario)*, 3rd edition, Porrúa, México 2000, p.104. This remaining ownership can be considered as an equitable ownership but we cannot use this term since it is not recognized by Mexican law.

<sup>83</sup> Idem., p.107

<sup>84</sup> Art. 382 LTOC

(art. 389 LTOC)<sup>85</sup>: (i) in case of a non-negotiable credit or a personal right, from the moment in which it is notified to the debtor; (ii) in case of a negotiable instrument, from the moment in which it is assigned to the fiduciary institution and when it is stated in the registries of the issuer; and (iii) in case of a corporeal thing or negotiable instruments payable to bearer, from the moment in which the fiduciary institution receives them.

### 3.4. Parties to a fideicomiso

There are mainly three parties in a *fideicomiso*. These are:

**3.4.1. *Fideicomitente*:** the person (individual or entity) who constitutes the *fideicomiso*, by means of a manifestation of his consent and transfers the legal ownership of the assets and/or rights intended for the *fideicomiso* to the fiduciary. It is the equivalent to the settlor in Anglo-Saxon Law.

Both, an individual<sup>86</sup> and an entity<sup>87</sup> can be *fideicomitentes*; with the essential requirement that they must have the legal capacity to transfer the property or the legal ownership of the assets or rights subject matter of the *fideicomiso*, and they must have the capacity to enter into the agreement (art. 384 LTOC). The Law also prescribes that the judiciary and administrative authorities, when competent, can be *fideicomitentes*.

It is possible to have more than one *fideicomitente*. For example, in the case of a real estate property held in co-ownership and destined to a *fideicomiso*<sup>88</sup>, all the co-owners of the property will be deemed as *fideicomitentes*.

Another important observation concerning the *fideicomitente* is that under Mexican law he can be also *fideicomisario*; in which case, the *fideicomitente* auto-designates himself as *fideicomisario*. “When the *fideicomitente* constitutes a *fideicomiso* without

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<sup>85</sup> See schedule 2

<sup>86</sup> Art. 450 and 451 of the CC establish who are the persons that do not have legal capacity. It is important to mention that, as stated by Monserrit, foreigners can also be *fideicomitentes* without needing an authorisation from the Government (art. 13 Trade Code and 148 Regulations of the Population General Law). This is different for foreign legal entities, since they do need an authorisation. The Law enumerates a number of activities that are reserved to Mexicans, to the State, and those in which foreigners can take part.

<sup>87</sup> Article 25 CC establishes who is considered as a legal entity.

<sup>88</sup> BATIZA, *El Fideicomiso: teoría y práctica*, Op. cit., p.196

designating a *fideicomisario*, he should be considered as *fideicomisario* and it is also him who retains the right to instruct the fiduciary in relation with the purpose and disposition of the assets”<sup>89</sup>.

The presence of a *fideicomitente* is essential in order for the *fideicomiso* to exist, since Mexican Law, as mentioned before, only allows express *fideicomisos*.

**a) *Fideicomitente’s* rights:** after an extensive analysis of several laws and doctrine, I found that the *fideicomitente’s* rights are different depending on the type of *fideicomiso*. According to the LTOC and LIC and the general principles of the *fideicomiso*, one could summarize this rights as the following:

- a. Set out the *fideicomiso*, and outline its purpose.
- b. Appoint one or more fiduciaries (art. 385 pr. 2 LTOC) and one or more *fideicomisarios*<sup>90</sup>(art. 382 pr. 2 LTOC).
- c. Transfer the assets and rights intended for the purpose of the *fideicomiso* to the fiduciary (art. 381 LTOC).
- d. Reserve for himself certain rights that are the subject matter of the *fideicomiso*, (art. 386 pr.2 LTOC) at the moment of the constitution or when modifications are made.
- e. Prescribe the creation of a Technical Committee and set out its faculties and the way it should operate (art. 80 pr.3 LIC).
- f. Demand from the fiduciary the performance of the obligations entrusted to her, at the time of the constitution / modification of the *fideicomiso*<sup>91</sup>.
- g. The removal of the fiduciary (art. 84 pr. 1 LIC), when he reserved this right for himself.
- h. Demand from the fiduciary, the obligation to render him the accounts of his management, when he has kept for himself this faculty (art. 84 pr.2 LIC).
- i. Demand form the fiduciary the devolution of the assets, when applicable (art. 393 LTOC).
- j. Modify the *fideicomiso* (when he kept this right for himself).

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<sup>89</sup> MONSERRIT, Op. cit.; p.117

<sup>90</sup> The *fideicomitente* can constitute a *fideicomiso* without designating a specific *fideicomisario*. (Art. 382 pr.3 LTOC).

<sup>91</sup> According to Batiza, even if the Law says nothing about this right, he considers that the *fideicomitente* can reserve this right to himself.

- k. Even though it is not of common use, nor prohibited, for certain types of fideicomisos, he may write to the fiduciary a non-binding letter of wishes.

This list of rights is not exhaustive; the *fideicomitente* could grant himself some further rights or could relinquish some of the above, according to his wishes.

**b) *Fideicomitente's obligations:*** as for this obligations, they can also vary from one type of *fideicomiso* to another but one can mention the following as being the most common and important ones:

- a. Transfer the rights and assets that are the subject matter of the *fideicomiso* to the fiduciary (art. 381 LTOC).
- b. "He is bound to the common reciprocal obligations of the rights he reserves for himself"<sup>92</sup>.
- c. Pay the professional fees and expenses generated as a result of the constitution, administration and execution of the *fideicomiso* to the fiduciary, when applicable.
- d. Name the fiduciary institution that will substitute the original fiduciary in case the latter is removed or rejects his appointment.
- e. The *Fideicomitente* assures that the *fideicomisario*, who wishes to buy the property transferred to the *fideicomiso* by the *fideicomitente*, could enjoy the property without interruption by virtue of paramount title<sup>93</sup>.
- f. Collaborate with the fiduciary for the fulfilment of the purposes (of the *fideicomiso*), particularly if such purposes cannot be accomplished without the help of the *fideicomitente*.
- g. All the other obligations acquired at the moment of the constitution or at any modification of the *fideicomiso* agreement.

**3.4.2. Fiduciary:** the fiduciary is the person entrusted with the performance of certain purposes, at the moment of the constitution of the *fideicomiso*. It has the legal

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<sup>92</sup> VILLAGORDOA, Op. cit., p.195

<sup>93</sup> This obligation arises since the *fideicomiso* involves the transfer of title of certain assets and rights to the *fideicomisario*. In cases where the *fideicomisario* is bound to pay for said transfer (onerous *fideicomiso*), the *fideicomitente* is always responsible to assure the transfer, without any liens of the property; but when the *fideicomiso* is gratuitous (the *fideicomisario* is not bound to pay anything to the *fideicomitente*), he is only responsible if he obliged himself to do so.

ownership of the assets and/or rights given in *fideicomiso* by the *fideicomitente*. In accordance with the LTOC<sup>94</sup>, in order to be able to act as a fiduciary institution, there has to be an express authorization to act as such on the corresponding law.

The LIC<sup>95</sup> establishes that only credit institutions are allowed to act as fiduciaries (full service banks<sup>96</sup> and development banks). In order for a credit institution to be able to act as a fiduciary, it needs to be a compliant financial institution with a specific authorization from the CNBV (art. 8 LIC). Nevertheless, there is no specific licence for a fiduciary to act as such, but it will be covered by the general authorization above mentioned. This means that only legal entities can act as such and it is completely excluded that an individual could act as a fiduciary in Mexican *fideicomisos*. Normally only banks act as fiduciaries; however, there are some exceptions to this rule and some other legal entities can act as fiduciaries when authorized by their own law. For example, the National Savings and Financial Services Bank<sup>97</sup> (*Banco de Ahorro Nacional y Servicios Financieros*), Insurance Institutions<sup>98</sup>, Bonding Companies<sup>99</sup>, Brokerage Firms<sup>100</sup> or the Mexican National Bank<sup>101</sup> (*Banco de México*).

The appointment of the fiduciary corresponds to the *fideicomitente* at the time of the constitution of the *fideicomiso* or in a later modification of the agreement. In case he does not designate a fiduciary, then it will be the *fideicomisario* who will designate him. More than one fiduciary institution can take part in the *fideicomiso* (art. 385 pr 2 LTOC).

The fiduciary institution can be *fideicomisario* in the *fideicomisos* whose purpose is to be used as a payment instrument of non-performed obligations for the credits granted by the institution itself to the *fideicomitente*, for the execution of business activities<sup>102</sup>. In this case, the parties should establish the respective terms and conditions in order to avoid future conflicts of interest.

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<sup>94</sup> Art. 385

<sup>95</sup> Art. 46 f. XV

<sup>96</sup> Banking and credit services.

<sup>97</sup> Art. 7 f. VII and VIII LOBANSF

<sup>98</sup> Art. 34 f. IV LISMS

<sup>99</sup> Art. 16 f. XV LIF

<sup>100</sup> Art. 16 f. IV d) LMV

<sup>101</sup> Art 7 f. XI LBM

<sup>102</sup> Art. 382 pr. 5 and Art. 396 LTOC. This is the case of guaranty *fideicomisos*.

The fiduciary can only excuse himself or quit his assignment when a judge considers the existence of a gross negligence<sup>103</sup>. The fiduciary will be responsible for the losses and damages that the assets may suffer, unless his actions are in accordance with the Technical Committee's decisions.

In the LTOC there are no specific rules that set out the rights and obligations of the fiduciary, but by studying this law and other dispositions (specifically Regulation 1/2005 BM<sup>104</sup>), we can confirm as follows:

- a) Fiduciary's rights:** article 391 LTOC establishes that the fiduciary will have all the rights and actions needed for the performance of the *fideicomiso's* purpose; except for the limitations established at the moment of the constitution of the *fideicomiso*. It is very difficult to establish a specific number of rights and obligations, since they change depending on the type of *fideicomiso*. Some of these rights are:
- a. To accept his designation as fiduciary (art. 382 pr.3 LTOC).
  - b. To receive the rights and/or assets intended for the *fideicomiso*.
  - c. Those mentioned in the incorporation papers (For example: right to perform acts of ownership, to administer, to lease, etc.); which are the intentions of the *fideicomitente* or the *fideicomisario*.
  - d. To represent the *fideicomiso* in all the proceedings related to it<sup>105</sup> and to grant power of attorney for litigation and collections.
  - e. To receive payment of the fees agreed, and demand the reimbursement of the *fideicomiso's* administration expenses, or to deduct them from the *fideicomiso's* assets (art. 2.5 Regulation 1/2005 BM)<sup>106</sup>.

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<sup>103</sup> Art. 391 LTOC. In this case, another fiduciary institution must be designated for it to replace the previous one. In case this is not possible, the *fideicomiso* will be extinguished (art. 385 pr. 3 LTOC). An example of this can be the case in which the fiduciary does not present the accounts of his administration to the *fideicomitente* or *fideicomisario*, as the case may be.

<sup>104</sup> See schedule 3

<sup>105</sup> This is because he is the titleholder of the assets and/or rights. (Court Precedent 6/90; June 25 1990; unanimity of four votes).

<sup>106</sup> BATIZA, *Principios del Fideicomiso y la administración fiduciaria*, 1st edition, México, 1977, Ed. Ecasa, p.162 quoted by PIÑA MEDINA and ACOSTA ROMERO, Op. cit., p.223

- f. To designate fiduciary agents by means of whom the fiduciary performs the management of the *fideicomiso* (art. 80 pr. 1 and art. 82 LIC). He is only authorized to delegate the matters that are considered as secondary.

**b) Fiduciary's obligations:** his obligations are mainly with the *fideicomitente* and the *fideicomisario*; although in some cases he is also obliged with some authorities<sup>107</sup>. “(...) the performance of his obligations is correlative to the exercise of his rights, since he must exercise them to achieve the purposes of the *fideicomiso*”<sup>108</sup>. In our days, a number of clauses have been created in order to reduce the risks taken by the fiduciary<sup>109</sup>. We consider the following obligations to be the most important:

- a. To execute the purpose entrusted to him by means of the *fideicomiso* (art. 381 LTOC).
- b. To act as a good paterfamilias (art. 391 LTOC).
- c. To preserve the assets of the *fideicomiso*, and to respond for the damages and losses that such assets may suffer (art. 391 *in fine* LTOC).
- d. To open and register special and separated accounting for each *fideicomiso* agreement that he celebrates (art. 79 LIC and art 86 pr. 2 LTOC), as well as to keep the required records of each *fideicomiso* they manage.
- e. To diversify risks when executing their operations as fiduciary (art. 51 LIC).
- f. To maintain the fiduciary secrecy / banking secrecy (art. 117 LIC).
- g. To render the accounts of his management of the *fideicomiso* to the *fideicomitente* or *fideicomisario*, as the case may be (art. 84 pr. 2 LIC), and to hand them periodical reports of the results of the *fideicomiso*.
- h. To withhold and pay the corresponding taxes (when required by law).
- i. To return the assets to the *fideicomitente* when applicable, or to the *fideicomisario*, in accordance with the terms fixed by the *fideicomitente* at the time of constitution of the *fideicomiso*<sup>110</sup> (art. 393 LTOC).
- j. To indemnify the *fideicomitente*, in case his actions were performed in bad faith, with negligence, or in excess of his authority<sup>111</sup>.

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<sup>107</sup> Such as the CNBV, Tax authorities, etc.

<sup>108</sup> VILLAGORDOA, Op. cit., p.198

<sup>109</sup> Federación Latinoamericana de Bancos, XV Congreso Latinoamericano de Fideicomiso, *Aspectos básicos de la gestión fiduciaria: La responsabilidad del fiduciario*, Panamá, September 7, 2005, p.19;

[www.felaban.com/memorias\\_congreso\\_colafi\\_2005/taller\\_de\\_nivelación\\_pre-congreso/11\\_miguel\\_garcia\\_laresponsabilidaddelfiduciario.pdf](http://www.felaban.com/memorias_congreso_colafi_2005/taller_de_nivelación_pre-congreso/11_miguel_garcia_laresponsabilidaddelfiduciario.pdf)

<sup>110</sup> MONSERRIT, Op. cit., p.126

- k. To carry out investments, in accordance with the *fideicomiso* agreement and for which the possibility to receive instructions from the *fideicomitente*, *fideicomisario*, or the Technical Committee can be agreed. (art. 3.1 Regulation 1/2005 BM).
  - l. To give the *fideicomitente* or *fideicomisario*, as the case may be, a copy of the *fideicomiso* agreement; as well as an inventory of the assets or rights that are part of the *fideicomiso* (art. 51 Regulation 1/2005 BM).
  - m. All those prescribed in the *fideicomiso* instrument and which are not against law.
- c) **Fiduciary's prohibitions:** the performance of his duty brings with it the prohibition to perform some activities. In general, such prohibitions include all actions that may be contrary to or more extended than what was agreed in the *fideicomiso* agreement. Nevertheless, the law prescribes some specific prohibitions that may change depending on the type of *fideicomiso*. Some of the main prohibitions prescribed in the different laws are, amongst others: (i) to act as fiduciary in the *fideicomisos* prohibited by law (art. 394 LTOC)<sup>112</sup>; (ii) to guarantee a specific return on the funds invested (art. 6.1.b. Regulation 1/2005 BM and art. 106 f. XIX.b. LIC); (iii) to act as a fiduciary in *fideicomisos* that receive funding from the public in general, except for public *fideicomisos* (art. 106 f. XIX.c. LIC).

**3.4.3. Fideicomisario:** the person entitled to receive the benefits of the *fideicomiso*. According to article 382 LTOC, in order to be a *fideicomisario*, he must have the capacity to receive the benefit stated under the *fideicomiso*. In case of legal incapacity, he will receive such benefits through its legal representative or tutor<sup>113</sup>. As for the *fideicomisos* carrying out a business activity<sup>114</sup>, the CCom (art. 12) prescribes that the commercial notary publics, the non-discharged from a bankruptcy, and the individuals convicted for crimes against property will not be able to act as

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<sup>111</sup> Idem.

<sup>112</sup> See section 3.6.

<sup>113</sup> In case the person is a minor, he or she will be represented by his/her guardian or by the person who exercises the *patria potestas*. Batiza mentions that “by demanding the capacity of the *fideicomisarios*, article 382 LTOC shall be understood not as the capacity demanded to the *fideicomitente*, but as the absence of a special incapacity arising from the Law; given that the *fideicomiso* can be constituted in favour of the unborn as well as in favour of a person who may not be legally entitled/eligible to act as a beneficiary.

<sup>114</sup> See quotation 148

*fideicomisarios*; since they are not allowed to perform any commercial activity. The *fideicomisario* has to exist (or at least be conceived) at the time of the decease of the *fideicomitente*<sup>115</sup>, for him to be able to receive the benefits corresponding to the *fideicomiso*.

He is appointed by the *fideicomitente* at the moment of the incorporation of the *fideicomiso* or in a later modification of the agreement. He is “not an essential party for the *fideicomiso* to exist”<sup>116</sup>; given that if the *fideicomitente* does not appoint a *fideicomisario* at this moment, the *fideicomitente* himself will be considered the beneficiary and the *fideicomiso* will be valid as long as its purpose is legal and specific (art. 382 pr.3 LTOC).

The *fideicomitente* has the right to appoint one or more *fideicomisarios* who will receive simultaneously or successively the benefits of the *fideicomiso*. He can also foresee for the *fideicomisarios* to receive the benefits of the *fideicomiso* at the moment of his death, as long as they are alive or conceived at the moment of the death of the *fideicomitente* (art. 394 f. II LTOC).

The *fideicomiso* will be null/void if the fiduciary appears as beneficiary, unless it is a guaranty *fideicomiso*<sup>117</sup>. Some authors criticize this conjunction of capacities by saying that the fiduciary should not be the beneficiary of the *fideicomiso* while being the fiduciary. Villagordoa says that there will always be an incompatibility in the exercise of these two capacities at the time by the same person. “In such cases the fiduciary would be enforcing the figure of the *fideicomiso* by himself and for his own benefit”<sup>118</sup>.

**a) *Fideicomisario’s rights:*** his rights differ, depending on the type of *fideicomiso* and on the *fideicomitente’s* intentions. They are contained either in the law or in the *fideicomiso* agreement. Nevertheless I would like to enumerate the following as being the most common:

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<sup>115</sup> In Trusts it is different, since for the Trust to be valid, the beneficiaries do not have to exist when the trust is created, neither when the settlor dies.

<sup>116</sup> MONSERRIT, Op. cit., p.141

<sup>117</sup> Art. 382 pr. 5 LTOC

<sup>118</sup> VILLAGORDOA, Op. cit., p.202

- a. To demand from the fiduciary the performance of the purposes of the *fideicomiso* (art. 390 LTOC).
- b. To demand from the fiduciary the benefits/products/assets of the *fideicomiso*<sup>119</sup> (depending on the type and purposes of fideicomiso).
- c. To contest the validity of any unfaithful actions undertaken by the fiduciary on detriment of the *fideicomisario*, and that exceeds the fiduciary's authority given to him in the incorporation act or by law (art. 390 LTOC).
- d. When appropriate, he has the legal action of repossession of the assets, which as consequence of the actions mentioned above (let. d), have been taken out of the *fideicomiso*'s property (Art. 390 LTOC). The purpose of this action is to return to the *fideicomiso*'s property the concerned assets. This right is recognized to the *fideicomisario* since he would be the most interested by the execution of this repossession<sup>120</sup> and the only one with a real economic interest in the assets and/or rights.
- e. To demand from the fiduciary to render him the accounts of his management and to remove the fiduciary in case he does not fulfil this obligation (art. 84 pr. 2 LIC).
- f. To transfer or to assign his rights to another person as long as it is permitted by law or by the *fideicomiso* agreement.
- g. To modify the fideicomiso when such power is granted in the *fideicomiso*'s agreement or by law<sup>121</sup>.
- h. And in general all those arising from the incorporation of the *fideicomiso* (art. 390 LTOC).

**b) *Fideicomisario*'s obligations:** they also depend on the type of *fideicomiso*. According to Villagordoa, we must make a distinction between two situations in order to be able to establish the *fideicomisario*'s obligations: (i) when we are in presence of a *fideicomiso* that has been created by the *fideicomitente* without giving notice to the *fideicomisario* or without requiring his involvement (in such cases, the *fideicomisario* cannot have any obligations); (ii) when the *fideicomiso* was created with the agreement of the *fideicomitente* and the *fideicomisario*, and establishes a

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<sup>119</sup> MONSERRIT, Op. cit., p.143

<sup>120</sup> PIÑA MORENO and ACOSTA ROMERO, Op. cit., p.241

<sup>121</sup> MONSERRIT, Op. cit., p.143

compensation in favour of the *fideicomitente* for the transfer made by the fiduciary in benefit of the *fideicomisario*, the *fideicomisario* has, amongst other obligations, the one of giving the agreed compensation. We consider that it is important to make this distinction; nonetheless, we would like to enumerate some of the obligations that in our view are the most important:

- a. Payment of fees to the fiduciary. This obligation is agreed between the parties at the moment in which the *fideicomiso* agreement is made. This obligation can fall either in the *fideicomitente* or the *fideicomisario*, but it is generally the *fideicomitente* who has the obligation to pay these fees<sup>122</sup>.
- b. To pay the taxes originated as a result of the transaction or business, when required. Later on we will describe the tax treatment of the *fideicomiso*, but in general terms, if it is an irrevocable *fideicomiso*, the obligation to pay taxes will fall on the *fideicomisario*.
- c. To notify the fiduciary about the transfer or conveyance of his rights to a third party.

**3.4.4. Technical Committee:** according to article 80 of the LIC pr. 3, the creation of a Technical Committee can be prescribed in the *fideicomiso* agreement or in a later modification. Given that the *fideicomitente* is the one who constitutes the *fideicomiso*, the right to decide upon the creation of such Committee, as well as to define its rights and obligations, resides on him.

The nomination, rights, and obligations of the Technical Committee have to be set out in the *fideicomiso* agreement and may vary in accordance to the *fideicomitente*'s wishes. Usually these obligations are related to the distribution of the *fideicomiso*'s assets (decisions on amounts, timing, etc.), without being limited to that.

The *fideicomitente* can prescribe in the *fideicomiso* agreement or in a later modification, the events in which the fiduciary will have the obligation to act in accordance with the Technical Committee's decisions. When the fiduciary has strictly

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<sup>122</sup> Art. 2.5 Regulation 1/2005 BM establishes that the fiduciary only has the right to receive the commissions and fees agreed in the *fideicomiso* agreement. The amount of those fees and commissions can be charged to the *fideicomiso*'s assets if agreed in the contract.

followed their advice, he will not be responsible for the losses and/or damages that the assets may suffer.

Usually the Technical Committee is integrated by persons who are of the full confidence of the *Fideicomitente*. The number of members in the Committee is to the entire discretion of the *fideicomitente*. It is of common practice to set out in the *fideicomiso* agreement, among other details, the way in which the Technical Committee will be integrated, how decisions will be taken, how those decisions will be communicated to the fiduciary institution or a third party, and the fees that the members will receive for the activities carried out on behalf of the *fideicomiso* (art. 2.3 Regulation 1/2005 BM).

As mentioned above, when acting in accordance with the instructions and decisions of the Technical Committee, the fiduciary will not be responsible for the damages or losses that the assets may suffer. Nevertheless, the above will not be applicable when the instructions lead the fiduciary to act in an illegal way or when those instructions are contrary to the purposes of the *fideicomiso*. In such cases, if the fiduciary decides not to act in accordance with those instructions, he has the right to request to the competent authorities or tribunals, to be released from any responsibility under the *fideicomiso*.

### **3.5. Types of *fideicomisos***

There is no classification of the *fideicomisos* in the law, but we can find that the doctrine has made different classifications by taking into account the personal elements, its purposes, and its structure, among others. We will focus mainly on the classification based on the purposes that the *fideicomiso* pretends to achieve; nevertheless we will also mention some other types of *fideicomisos*.

**3.5.1. Investment *fideicomiso*:** under this type of *fideicomiso*, the *fideicomitente* transfers assets or rights to the fiduciary, for him to invest them and then give them back to the *fideicomitente* or the *fideicomisario* at the end of the *fideicomiso* together with the outcome of the investment. Generally, in these *fideicomisos*, the *fideicomitente* is also the beneficiary. The *fideicomitente* is looking for his money to be productive and to get as much profits of the investments as possible throughout his lifetime as

*fideicomisario*. “The fiduciary accomplishes his task when she makes the investment by means of the acquisition of assets, which generate a return on capital; such as fixed or variable income instruments, treasury bonds, obligations of common or preferential shares on companies (Sociedades Anónimas)”<sup>123</sup>, etc.

The fiduciary has to act in accordance with Regulations 1/2005 BM, which recommends that all the instructions to be given by the *fideicomitente* should be stipulated in the *fideicomiso* agreement. Once the fiduciary has obtained the profits of those investments by following the instructions or the agreed terms, he has the right to pay his own expenses and the obligation to pay taxes generated by the profits obtained; finally he has to give to the *fideicomisario* the corresponding surplus of such profits.

Generally, this type of *fideicomiso* is revocable (if the *fideicomitente* reserved for himself that right) during the lifetime of the *fideicomitente*, and it becomes irrevocable after his death.

The life insurance *fideicomiso* and retirement plan (for employees) *fideicomiso*, among others, are generally structured as investment *fideicomisos*.

**3.5.2. Management *fideicomiso*:** the fiduciary manages the assets (usually real estate assets) transferred to him by the *fideicomitente*, in accordance with the provisions of the agreement. Usually it is the *fideicomitente* who is the beneficiary of these *fideicomisos*. The purpose of this *fideicomiso* is to transfer all the daily and active work of the real estate property to the fiduciary, such as: rentals, payment of expenses, taxes and generally keep it in favour of the *fideicomisario*.

For example:

Mrs. Smith owns a house, and she wishes to transfer it into a *fideicomiso* for the fiduciary to manage it. She gives the fiduciary the instructions to manage the house, to rent it and use the proceeds of such rent to pay the expenses of the property and transfer the remaining funds, to her daughter

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<sup>123</sup> VILLAGORDOA, Op. cit., p.232

(*fideicomisario*) on a yearly basis, once she has attained the age of 18 years. The *fideicomiso* will be extinguished once the property and its remaining proceeds have been transferred to the *fideicomisario*.

**3.5.3. Guaranty/Security fideicomiso:** “by means of this *fideicomiso*, the *fideicomitente* transfers the legal title of certain assets or rights to the fiduciary, with the purpose of guarantying the fulfilment of an obligation”<sup>124</sup> towards the creditor (who is appointed as *fideicomisario*) and its priority over the corresponding payment. It is a subordinated contract, which has as purpose to guarantee the performance of the commitment the *fideicomitente* undertook under a separate agreement. (e.g. Loan agreement, recognition of a debt owed, acknowledgement of indebtedness among others)

These types of *fideicomisos* do not grant a *right in rem* in favour of the *fideicomisario* (creditor) but only the right to demand to the fiduciary to proceed with the sale or execution of the assets or rights subject to a *fideicomiso* (execute the guarantee) in order to receive the payment of the loan in case the *fideicomitente* fails to execute his obligation (art. 402 LTOC).

This *fideicomiso* is especially regulated in the LTOC from article 395 to 406. The law lists the institutions and corporations that are allowed to act as fiduciaries in this kind of *fideicomisos*. As we mentioned before, it is possible for the fiduciaries to be *fideicomisarios* in this type of *fideicomisos*, when the purpose of the *fideicomiso* is to guarantee obligations in its own favour (art. 396 LTOC).

This *fideicomiso* will be irrevocable until the moment in which the *fideicomisario* notifies the fiduciary that the *fideicomitente* executed the obligations acquired (art. 397 LTOC)<sup>125</sup>. At this moment, the *fideicomisario* will have no further rights on the *fideicomiso*. It is also reversible, since its purpose is not to transfer the property in favour of the *fideicomitente*, but to guarantee an obligation.

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<sup>124</sup> Idem., p.p.226-227

<sup>125</sup> MONSERRIT, Op. cit., p.210

**3.5.4. Revocable fideicomiso:** when the *fideicomitente* reserves for himself the right to revoke or modify the agreement. Generally this is possible when the *fideicomiso* is a result of a gratuitous act<sup>126</sup> (not in case of guarantee *fideicomisos*). The *fideicomitente* maintains the legal ability to reacquire the *fideicomiso*'s assets from the fiduciary.

**3.5.5. Irrevocable fideicomiso:** it is not possible for the *fideicomitente* to revoke the agreement (e.g.: guaranty *fideicomiso*, at least until the *fideicomitente* has fulfilled his obligation), since he did not expressly reserved for himself the right to do so, as part of the *fideicomiso* agreement. This also means that the essential elements of the *fideicomiso* such as: the object, parties, and term cannot be modified.

**3.5.6 Fideicomiso created by disposition of law:** also called Public *Fideicomiso*. Article 77 of the LOAPF establishes that these *fideicomisos* are those created by the federal, local or municipal government or a *paraestatal*<sup>127</sup> entity (*fideicomitente*); in order to help the Executive Power<sup>128</sup> to promote certain areas for the development of the country. They are created by the Legislative Power in order to protect the needs of a particular group or social class, by creating a patrimony that will be used in their favour. By means of these *fideicomisos*, the government supports activities that are useful for the social and economic development of the country. Its purpose will always be of public interest (e.g. Farming and Agricultural Sector, Fishing Industry, Rural Sector, Tourism Development, amongst others)

**3.5.7. Property transfer fideicomiso:** “those in which the purpose of the *fideicomitente* is to transfer the ownership of the assets and/or rights given in *fideicomiso* to the *fideicomisario*, once the established requirements have been fulfilled”<sup>129</sup>. Most of the time they are irrevocable since their purpose is to transfer the property of a certain asset or right to a third person. However the law does not prescribe a specific requirement on revocability for this type of *fideicomisos*.

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<sup>126</sup> VILLAGORDOA, Op. cit., p.223. For further information on the gratuitous *fideicomiso*, please see quotation 94 above.

<sup>127</sup> Companies that are owned or controlled wholly or partly by the Government (semi-public entities).

<sup>128</sup> President of the Republic.

<sup>129</sup> Villagordoa, Op. cit., p.226

**3.5.8. Fideicomiso in restricted zone:** the Mexican Constitution forbids foreigners to acquire property in the restricted zone (located within a 100km band from the geographical borders of the Country and a 50km band along the coasts). It is by means of this *fideicomiso* that foreigners are allowed to purchase property within the restricted area for residential purposes. A special feature of these *fideicomisos* is that the foreigner cannot gain the title to that land, but he would have instead the unrestricted right to use the property. The LIE authorizes the Minister of Foreign Affairs to give authorization to the credit institutions (fiduciaries) to acquire real estate property in this area and designate a foreigner as *fideicomisario*<sup>130</sup>.

The seller of the property acts as *fideicomitente*, the Mexican bank acts as the fiduciary, and the foreign buyer as the beneficiary or *fideicomisario*. The Mexican bank acting on behalf of the foreigner purchases the property and holds the title of the property; the buyer pays the bank the purchase price agreed with the seller and in return, becomes the beneficiary of the property.

The buyer's beneficiary rights are limited to a period of time of 50 years, which can be renewed for the same period<sup>131</sup>.

**3.5.9 Testamentary fideicomiso:** it is an *inter vivos fideicomiso*, created by a unilateral declaration of intent of the *Fideicomitente*, and arises upon the death of the *fideicomitente*. "Due to its nature, it must be stated in the *fideicomitente's* will, since it takes effect upon his death"<sup>132</sup>. This type of *fideicomisos* are allowed, as long as the substitution of the beneficiaries is made in favour of persons that are alive or conceived at the moment of the *fideicomitente's* death (art. 394 f. II LTOC). The fiduciary normally has the obligation to invest or to manage the assets until the *fideicomisario(s)* have fulfilled the conditions established by the *fideicomitente*; such as attaining a certain age, studying a specific career, etc.

Some of the advantages of these *fideicomisos* are:

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<sup>130</sup> Idem., p.234

<sup>131</sup> The Illinois Business Law Journal, March 2, 2006, Purchasing beachfront property in Mexico: How Americans circumvent Mexico's constitutional prohibition.

[http://iblsjournal.typepad.com/illinois\\_business\\_law\\_soc/2006/03/purchasing\\_beac.html](http://iblsjournal.typepad.com/illinois_business_law_soc/2006/03/purchasing_beac.html).

<sup>132</sup> VILLAGORDOA, Op. cit., p.241

- a) The judicial procedures related to the intestate proceedings, as the expenses and fees generated by these procedures are avoided<sup>133</sup>.
- b) During the life of the *fideicomitente*, it is revocable but becomes irrevocable upon his death.

### 3.6. Prohibited fideicomisos

As mentioned before, the law foresees the circumstances in which a *fideicomiso* will be prohibited (art. 394), these are:

- a) **Secret *fideicomisos*:** the purpose of the *fideicomiso* needs to be clearly defined and certain. In case it is not specific and clear, the law will presume that the purpose was meant to be secret and, therefore, a null and void *fideicomiso*. The fiduciary has an active role in deciding on the clearness of the purpose outlined, and has the right to refuse a *fideicomiso* that she considers as not having a specific and clear purpose.
- b) **Successive *fideicomisos*:** for a *fideicomisario* to have the right to receive the benefits of the *fideicomiso* he has to be alive or at least conceived upon the death of the *fideicomitente*. The law expressly prescribes that the *fideicomisos* where the benefit is given to several persons that should substitute each other successively upon the death of the previous beneficiary will be prohibited. The only exception to this principle is when the beneficiaries are alive or conceived at the moment of death of the *fideicomitente*. This prohibition is made in order to prevent permanent and successive *fideicomisos*.
- c) **Extended legal duration:** a *fideicomiso* set up for the benefit of individuals or for an entity which is neither a public one nor a public charity, cannot last more than 50 years. The law is not clear on the period of time that a *fideicomiso* can last in case of individuals; nevertheless, in practice, it is also a 50 year period. Prescribing a longer period would qualify the *fideicomiso* as prohibited. However, a longer period will not invalidate the *fideicomiso* when its purpose is the maintenance of scientific or artistic museums, which do not have a profitable purpose. The parties can foresee the renewal of this term in the agreement.

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<sup>133</sup> MONSERRIT, Op. cit., p.181

### 3.7. Termination, non-existence and nullity of the *fideicomiso*:

#### 3.7.1 Termination

The causes by which the *fideicomiso* is terminated can be divided in two: (i) those agreed by the parties and; (ii) those that are mandatory by law<sup>134</sup>.

At the time of the signature of the *fideicomiso* agreement, the parties can prescribe the circumstances in which the *fideicomiso* will be terminated. Nevertheless, these agreed causes cannot have a restrictive or exclusive character, as there are other circumstances that are mandatory (specifically art. 392 LTOC) and will apply even if the parties have not agreed on them in the *fideicomiso* instrument.

Even though the parties may freely agree on different termination causes, the mandatory ones, prescribed by law, may be summarized as follows (art. 392 LTOC):

- a) **The achievement of the purpose for which the *fideicomiso* was constituted:** the fiduciary is in charge of achieving said purpose and stating when it has been achieved. Therefore, once the entirety of the assets of the *fideicomiso* have been used and transferred either to the *fideicomitente*, to the *fideicomisario*, or to a third party designated by the *fideicomisario*; the *fideicomiso* has no longer a reason to exist and will therefore be deemed as terminated.
- b) **The purpose of the *fideicomiso* becomes impossible to achieve:** when the fiduciary is no longer able to achieve the purpose of the *fideicomiso*. For example, when the *fideicomiso* is created in order to pay a debt that has already been covered in fully by an external source.
- c) **Impossibility or non happening of the condition precedent<sup>135</sup>:** when there is certainty that the condition precedent in which the *fideicomiso* depends will not occur, or in cases in which this condition precedent did not occur in the period of time agreed by the parties; this period cannot exceed 20 years after the

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<sup>134</sup> *Idem.*, p.163

<sup>135</sup> According to Black's Law Dictionary, it is an act or event, other than the lapse of time, that must exist or occur before a duty to perform something promised arises

*fideicomiso*'s constitution<sup>136</sup>. For example, when the *fideicomitente* states that the *fideicomisario* will receive the benefits of the *fideicomiso* once he attains the age of 30 years (condition precedent), but he dies before attaining this age.

- d) By the performance of the condition subsequent<sup>137</sup> to which the *fideicomiso* was subject:** the *fideicomiso* will exist until the occurrence of an agreed condition. For example, when the *fideicomitente* foresees giving an amount of money every month to the *fideicomisario*, until he gets married or graduates from university. Therefore, once he gets married or graduates the *fideicomiso* will be terminated.
- e) By express agreement of the parties:** the termination causes must be agreed by the parties involved in the *fideicomiso* (*fideicomitente*, fiduciary and *fideicomisario*). The agreement must be in writing in order for it to be valid and effective. Through the agreement, “the parties fully and entirely release the fiduciary, letting him know their intention to terminate the agreement and instructing him on what to do with the *fideicomiso*'s assets”<sup>138</sup>. For the termination to be effective it is necessary that the assets are transferred to the persons entitled to receive them.
- f) By revocation made by the *fideicomitente*:** this possibility is only viable when the right to revoke has been reserved for the *fideicomitente* at the moment of creation of the *fideicomiso*, or in a later modification of the agreement duly agreed by the parties. In such case, “an express cause for revoking the agreement is not needed”<sup>139</sup>. The *fideicomitente* asks the fiduciary to return to him all the *fideicomiso*'s assets and/or rights (together with the outcome of the investments), and upon distribution the *fideicomiso* will be terminated. It is not possible to revoke the agreement if its purpose is the payment of an obligation that the *fideicomitente* may have (guaranty *fideicomiso*) with a third party.
- g) Impossibility to replace the fiduciary:** as I mentioned previously, when the fiduciary is removed or resigns, he has to be replaced by another fiduciary institution. If this replacement is not possible, the *fideicomiso* will be terminated (art. 386 p.3 LTOC), unless provided differently in the agreement.

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<sup>136</sup> Not to confuse the 50 year term established in art. 394 LTOC

<sup>137</sup> According to Black's Law Dictionary, it is a condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, discharges a duty of performance that has arisen.

<sup>138</sup> Monserrit., Op. cit.,p.165.

<sup>139</sup> Idem.

- h) Non-payment of fees due to the fiduciary:** generally, the fees that are to be paid to the fiduciary are fixed in the agreement. If the *fideicomitente* or the *fideicomisario*, as agreed on the *fideicomiso* agreement, fail to pay those fees, the *fideicomiso* will be terminated. Such default has to take place for a period of three or more years and it is the fiduciary institution that will terminate the agreement, with no responsibility; but he will have the obligation to transfer the assets and/or rights to the person entitled to receive them (art. 392 Bis LTOC), according to the *fideicomiso* agreement.
- i) When created in fraudulent conveyance:** art. 386 LTOC.

There are other circumstances, which are not enumerated in the Law, that also have as a consequence the termination of the *fideicomiso*, some of this circumstances are:

- a) Termination of the period:** meaning that the *fideicomiso* will only exist during the period of time agreed by the parties and in accordance with art. 394 LTOC (50 year period).
- b) Destruction of the *fideicomiso*'s assets and/or rights:** if the assets and/or rights are destroyed, there will be no subject matter and, as a consequence, the *fideicomiso* will be terminated since the subject matter is an essential element of the *fideicomiso*. It will also be terminated in case of expropriation of the assets.
- c) Suspension or termination of the *fideicomitente*'s rights:** when he has no longer rights on the assets and/or rights transferred to the fiduciary institution.
- d) Decease of the *fideicomisario*:** if no substituted *fideicomisarios* have been appointed in the *fideicomiso* agreement, then it will be the *fideicomisario*'s heirs who will have the right to receive the *fideicomiso*'s assets.
- e) Resignation of the *fideicomisario*:** if he resigns and the *fideicomitente* has already passed away, it is not possible to appoint a new beneficiary; so the *fideicomiso* will be terminated and the assets and/or rights transferred to the *fideicomitente*'s heirs.

### 3.7.2. Consequences of termination

“The termination of the *fideicomiso* occurs when the assets are no longer in the property of the fiduciary because they are reverted to the *fideicomitente* (or his heirs) or

transferred to the *fideicomisario* (or the person designated by him) (...)”<sup>140</sup>, as the case may be.

When transferring the assets and/or rights, its nature must be taken into account. If it is real estate property or rights *in rem* invested on those rights, the fiduciary institution has to declare the transfer and register this operation in the PRREP (art. 393 pr. 2 LTOC). In addition, this operation must also be confirmed in a public instrument before a notary.

Another consequence of the termination is that the registration made before the PRREP, when the *fideicomiso* was constituted on real estate property, is cancelled. It also has as a consequence the liquidation of the *fideicomiso*'s net assets.

### **3.7.3. Non-existence of the *fideicomiso***

For a *fideicomiso* to be non-existent, there has to be a lack of consent or of subject matter on the legal act, In this case, such legal act will have no legal effects (art. 2224 CC), cannot be confirmed, and will not prescribe.

### **3.7.4. Nullity of the *fideicomiso***

Before studying the specific cases that trigger the annulment of the *fideicomiso*, it is important to mention how the CC defines this concept. Article 2225 CC establishes that if either the subject matter of the legal act, its purpose or the condition affecting the legal act are illegal, such act will be null, in an absolute<sup>141</sup> or relative<sup>142</sup> extent.

#### **3.7.4.1. Absolute Nullity**

“A *fideicomiso* will be affected with absolute nullity if it lacks, at the time of its constitution, of an essential element required for it to be valid”<sup>143</sup>. In other words, if

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<sup>140</sup> Idem., p.166

<sup>141</sup> See art. 2226 CC

<sup>142</sup> See art 2227 CC

<sup>143</sup> DOMÍNGUEZ MARTÍNEZ Jorge Alfredo, *El Fideicomiso*, 11<sup>th</sup> edition, Porrúa, México 2006, p.137

its purpose is illegal or contrary to the law or public policy, the *fideicomiso* will be affected with absolute nullity. The legal act affected with this kind of nullity will produce its effects until the judges declare such nullity and it cannot be ratified. Nevertheless, such judgement will have retroactive effects. The following are situations in which the *fideicomiso* will be considered as affected with absolute nullity:

- a) A *fideicomiso* created in favour of the fiduciary (except in cases of guaranty *fideicomisos*) as established in art. 383 LTOC<sup>144</sup>.
- b) When the rights and/or assets intended for the *fideicomiso* are non-transferable or strictly personal of their legal owner (art. 386 pr. 1 LTOC).
- c) When it has been created in fraudulent conveyance (art. 386 pr.3 LTOC) the persons who have an interest in demanding their annulment, are entitled to do it.
- d) When the *fideicomiso* is considered as prohibited, in accordance with article 394 LTOC.
- e) When a formality is required for it to be valid, such as the case of testamentary *fideicomisos*.

Under these circumstances, there will be the presumption that the *fideicomiso* has never existed.

#### **3.7.4.2 Relative Nullity**

Article 2228 CC enumerates the cases where a legal transaction will be affected with relative nullity (error, fraud, duress, unconscionable bargain or legal incapacity). “The relative nullity can be temporary”<sup>145</sup> as it can be ratified, and it can only be pleaded by the person who has either suffered such vitiated consent, has been affected by the unconscionable bargain, or is legally incapacitated. Some examples of situations in which the *fideicomiso* will be affected with relative nullity are:

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<sup>144</sup> Direct Writ of Amparo 4391/69, Banco Hipotecario, Fiduciario y de Ahorro, S.A., November 6, 1970, Cinco votos, Ponente: Mariano Azuela, Secretario: Roberto del Carmen Gómez. This court precedent states that in such cases the *fideicomiso* will be null.

<sup>145</sup> DOMINGUEZ MARTINEZ., Op. cit., p.138

- a) A *fideicomiso* in which the settlor is a minor or a legally incapable person.
- b) When it does not fulfill the requirement established in art. 389 LTOC (the *fideicomiso* must be in writing). This nullity will no longer be effective if the parties declare their intentions to create a *fideicomiso*, in writing.
- c) When created under duress, error, fraud, or unconscionable bargain.

The *fideicomiso* settled under relative nullity will be valid as long as the affected person does not plead on the contrary and his/her right to plead relative nullity will become time-barred with the course of time.

#### 4. TAX TREATMENT OF THE MEXICAN FIDEICOMISO

Our purpose throughout this section is not to provide a complete and detailed study of the different taxes that may result from a *fideicomiso*, but rather to give a general overview of the taxes that may apply to a *fideicomiso*, since the tax consequences may change from one *fideicomiso* to another. We must take into account a various number of circumstances such as, the type of *fideicomiso*, the parties involved, the *fideicomiso*'s assets, etc.

“While analysing the tax framework of the *fideicomiso*, we have to take into account the taxes generated as a consequence of business activities<sup>146</sup> made by means of a *fideicomiso*; the taxes generated by the fiduciary, as credit institution and as legal owner of the *fideicomiso*'s assets; and, last but not least, the tax obligations generated by the *fideicomisarios* as a consequence of the fulfilment of the *fideicomiso*'s purposes”<sup>147</sup>.

“The tax framework of the *fideicomiso*, (...), appears as a response of the legislator to the tax strategies that by means of the *fideicomiso* have been implemented by individuals”<sup>148</sup> throughout time. For instance, before the implementation of these regulations, the *fideicomiso* was used by individuals as an instrument to avoid taxes.

It is very difficult to determine whether the income that arises from a *fideicomiso* should be taxed with a specific tax. Each case must be studied separately, taking into account the cause and nature of the income, the situation of the beneficiary and the *fideicomiso*'s assets, given that each income can be taxed with a different tax depending on these circumstances. There are some cases in which some common rules will apply, but we must always have in mind the possible exceptions<sup>149</sup>.

In tax matters concerning the *fideicomiso*, we can find tax obligations concerning either the *fideicomitente*, the fiduciary or the *fideicomisario*. As we mentioned before in the previous chapter, the fiduciary is not the real owner of the property given in *fideicomiso*, “meaning

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<sup>146</sup> The definition of business activity comprises the following activities: commercial, industrial, agricultural, cattle raising, fishing and forestry. (Art. 16 CFF)

<sup>147</sup> VILLAGORDOA, Op. cit., p.259

<sup>148</sup> MORENO PÉREZ Alejandro, *Marco fiscal del fideicomiso*, Podium Notarial, Revista del Colegio de Notarios del Estado de Jalisco, No. 13, January – June 1996, p.63,

<http://www.juridicas.unam.mx/publica/librev/rev/podium/cont/13/cnt/cnt5.pdf>

<sup>149</sup> BATIZA MARCIAL LUJAN Rodolfo, *El Fideicomiso : Teoría y Practica*, 9th edition, Porrúa, México 2009, p.197

that by this act (the transfer) a full transfer of property (from the *fideicomitente* to the fiduciary) does not take place, the fiduciary receives (temporarily) the rights and actions that he needs in order to accomplish the purposes of the *fideicomiso*”<sup>150</sup>. For this reason, no tax is generated as a consequence of this transfer. The taxation is generated, most of the times, when the *fideicomisario* is appointed or receives the assets.

In order to understand in a better way the tax implications of the *fideicomiso*, it is important to mention and explain some specific dispositions contained in diverse tax codes and laws that regulate this figure. These dispositions are the following:

#### 4.1. Mexican Tax Code

The CFF enumerates the cases in which an alienation of property takes place. Article 14 f. V and VI regulates the alienation of property in case of a *fideicomiso* and sets out a number of specific circumstances in which it will be considered as such. The alienation of property is subject to income tax, payable for the capital gains (difference between the transfer price and the cost of the acquisition minus the deductions allowed by law<sup>151</sup>). The maximum tax rate applicable to income tax is 28%.

The definition of alienation of property comprises, amongst others:

- a) The alienation made by means of a *fideicomiso* in the following circumstances:
- The act where the *fideicomitente* appoints or commits to appoint a *fideicomisario* other than him; as long as he does not have the right to reacquire the *fideicomiso*'s assets (revocable *fideicomiso*).
  - The act where the *fideicomitente* loses his right to reacquire the assets from the fiduciary, if he reserved this right for himself. For example: he loses this right in a later modification of the *fideicomiso* agreement.
- b) The assignment of the rights that a person may have over the assets intended for the *fideicomiso*, in the following circumstances:

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<sup>150</sup> DOMÍNGUEZ MARTÍNEZ, *El Fideicomiso*, Op.cit., p.229

<sup>151</sup> Art. 148 LISR

- The act where the appointed *fideicomisario* assigns his rights or gives instructions to the fiduciary to transfer said rights to a third person.
- The act where the *fideicomitente* assigns his rights, including the right to have the assets returned to him

From the above we can infer that there will be no taxation if there is no alienation of property in the *fideicomiso*. It is important to mention that if the *fideicomitente* is also the *fideicomisario*, there will be no alienation of property; nonetheless, the *fideicomisario* will have to pay taxes on any yield from the *fideicomiso*'s assets (in case there is any).

If the *fideicomitente* does not appoint a *fideicomisario* and as long as the assets and/or rights continue to be on his favour or he maintains the legal right to reacquire the assets, there will be no alienation of property and therefore, no tax consequence, from the capital gain perspective, will take place.

#### 4.2. Income Tax Law

A *fideicomiso* might be subject to income tax payable by the *fideicomitente* or the *fideicomisario* as the case may be, on returns generated by the portfolio or the business activity carried out by the *fideicomiso*.

Regarding the definition of business activity carried out by a *fideicomiso*, article 13 LISR regulates such cases. “The *fideicomiso* by means of which business activities are performed has as consequence that the individuals considered as *fideicomisarios* will be subject to the business activities tax regime”<sup>152</sup>.

The fiduciary has the obligation to pay taxes for the assets in *fideicomiso*. He has to establish the profits or tax losses of those business activities in each tax year and will accomplish on behalf of all the *fideicomisarios* the obligations established by law, including the obligation to make provisional payments. The fiduciary will be jointly responsible, with the taxpayers, up to the amount of those payments (art. 26 f.II LISR).

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<sup>152</sup> MORENO PÉREZ, Op. cit., p.64

Paragraph 2 of this article prescribes that the *fideicomisarios* will have to add to their personal income tax their share on the earnings resulting from the business activity of the *fideicomiso*. In the same proportion they will be able to credit the amount of the provisional payments already made by the fiduciary institution on their behalf, as well as to deduct the applicable losses.

The *fideicomisario* will have the obligation to reimburse afterwards those provisional payments to the fiduciary, which are normally deducted from the *fideicomiso*'s assets. The fiduciary institution will file a tax return for her own activities as a fiduciary institution and one separate tax return for each of the *fideicomisos* that she manages. If the *fideicomisario* is an individual and not an entity, he must include this income as arising from a business activity (art. 13 p.9 LISR).

“It is neither the *fideicomiso* nor the fiduciary who will be considered as taxpayer; the tax obligation will correspond to the *fideicomisarios*”<sup>153</sup> or *fideicomitentes*, as the case may be. Nevertheless, this article provides certain formal obligations that the fiduciary has to fulfil. The *fideicomitente* will only be subject to the tax obligation when the *fideicomisario* is not appointed or he cannot be identified.

When a non-resident is appointed as *fideicomisario*, a permanent establishment<sup>154</sup> shall be deemed to exist with respect to all business activities carried out in Mexican territory through the *fideicomiso*. They will have to file an annual tax return for the corresponding income tax arising from those activities.

In cases in which no *fideicomisario* has been appointed or he can not be identified, it is considered as if the *fideicomitente* was the one who performed those business activities.

The *fideicomisarios* or the *fideicomitente*, as the case may be, will be responsible if the fiduciary fails to comply with his tax obligations regarding the *fideicomiso*.

Another important disposition contained in the LISR is article 144, which mentions that in

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<sup>153</sup> *Idem.*, p.65

<sup>154</sup> Art. 2 LISR

the *fideicomiso* where the temporary use or enjoyment of a real estate property is given to a third party (leasing), the returns of that operation will be considered as income for the *Fideicomitente*, regardless of the fact that the *fideicomisario* is a third person (not the *fideicomitente*), due to the right kept by the *fideicomitente* to reacquire the assets in *fideicomiso*. However, this is not the case in irrevocable *fideicomisos*, where the *fideicomitente* does not have the right to reacquire the assets. In such cases, the return of the operation will be considered as an income for the *fideicomisario*, from the moment the *fideicomitente* loses the right to reacquire the real estate property.

In this case, it is the fiduciary who will make the provisional payments on behalf of the person to whom the income is related.

Summarizing, in case of revocable *fideicomisos*, the *fideicomitente* will pay income taxes for any and all profits generated by the *fideicomiso's* assets. To the contrary, in an irrevocable *fideicomiso* the *fideicomisarios* will be liable to pay the income tax owed from the profits generated by the *fideicomiso*.

Furthermore, depending on the type of operation performed by the *fideicomiso*, or the assets held through the *fideicomiso*, on top of the income tax, the alienation of the *fideicomiso's* assets or leasing can also generate other taxes such as: IETU, VAT, ISAI. Real estate also generates annual property taxes ("*impuesto predial*"). These taxes are also paid by the fiduciary and the *fideicomisario* or *fideicomitente* will reimburse the fiduciary.

### 5. COMPARATIVE CHART BETWEEN THE TRUST AND THE *FIDEICOMISO*

	TRUST	FIDEICOMISO
<b>LEGAL NATURE</b>	Equitable obligation. It can be bilateral or unilateral. No written formality needed	Agreement requiring the written formality. Always bilateral.
<b>PARTIES</b>	<u>Settlor</u> : any person as long as he is legally capable. <u>Trustee</u> . any person as long as he has natural and legal capacity. It can be an entity or an individual. <u>Beneficiary (ies)</u> : any person.	<u>Fideicomitente</u> : any person as long as he is legally capable. <u>Fiduciary Institution</u> : only credit institutions (usually banks) with an express authorization. <u>Fideicomisario</u> : must have the capacity to receive the benefits of the <i>fideicomiso</i> . In case of incapacity he will receive throughout his legal representative. Business activities exception.
<b>TYPES</b>	<ul style="list-style-type: none"> <li>• Express.</li> <li>• Arising by operation of Law (can be also private).</li> <li>• Public Trusts (charitable)</li> </ul>	<ul style="list-style-type: none"> <li>• Express.</li> <li>• Public <i>Fideicomisos</i> (created by disposition of law in benefit of the public interest).</li> </ul>
<b>TRUST'S OR FIDEICOMISO'S PROPERTY</b>	Not part of the settlor's or trustee's assets. In case of bankruptcy of the trustee, the assets and/or rights will not be part of the bankruptcy estate.	It is an autonomous patrimony that is not part of the <i>fideicomitente's</i> or fiduciary's assets. In case of bankruptcy of the fiduciary, the assets and/or rights will not be part of the bankruptcy estate.
<b>SUBJECT MATTER</b>	It must be certain and transferable. Any kind of assets can be the subject matter of a Trust as long as its transfer is not forbidden by law.	It must be certain and transferable. All assets and/or rights except if they are not tradable or strictly personal.
<b>PURPOSES</b>	Not against public policy and it must be legal and certain.	Not against public policy and it must be legal and certain
<b>FORMALITIES</b>	<ul style="list-style-type: none"> <li>• In writing if creating a trust on land or property.</li> <li>• In writing if created by will.</li> <li>• All others can be in writing or orally.</li> <li>• The use if a non-binding letter of wishes written by the settlor is very common.</li> </ul>	<ul style="list-style-type: none"> <li>• In writing.</li> <li>• If creating a <i>fideicomiso</i> on real estate property, it must be registered before the PRREP.</li> <li>• In a private document for all other assets and/or rights.</li> <li>• An authorization is required from the Ministry of Foreign Affairs in order to create a <i>fideicomiso</i> intended to hold property in a restricted zone.</li> </ul>

		<ul style="list-style-type: none"> <li>• The use of a non-binding letter of wishes written by the <i>fideicomitente</i> is not very common.</li> </ul>
<b>DURATION</b>	<p>Life in being (of the settlor) plus 21 years. Perpetuity period varies in each jurisdiction; e.g. Bermuda, Bahamas, etc.</p>	<ul style="list-style-type: none"> <li>• As a general rule (for legal entities), the maximum period is 50 years. This period can be renewed but this possibility has to be stipulated in the <i>fideicomiso</i> agreement.</li> <li>• The law is not clear on the duration of a <i>fideicomiso</i> when the beneficiaries are individuals. In practice, the maximum period of 50 years is applied to this type of <i>fideicomisos</i>.</li> <li>• A period of more than 50 years is allowed when the purpose of the <i>fideicomiso</i> is the maintenance of museums with non-profitable purposes, and the beneficiary is a public or charitable entity.</li> </ul>
<b>REPORTING</b>	<ul style="list-style-type: none"> <li>• The trustee's obligation to report may vary from one jurisdiction to another but, generally speaking Anglo – Saxon Trusts are private agreements with no obligation to inform the authorities. There is no public registry of Trusts, nor a licence required per Trust.</li> <li>• The settlor and the beneficiary have no legal obligation to report, but there may be tax obligations, depending on the personal conditions, domicile and tax conditions of the settlor and the beneficiary.</li> </ul>	<ul style="list-style-type: none"> <li>• The fiduciary will have the obligation to report the existence of <i>fideicomisos</i> in restricted zones, and those <i>fideicomisos</i> created with the purpose to do business investments (national and foreign) in the Mexican territory.</li> <li>• The <i>fideicomitente</i> and the <i>fideicomisario</i> have to inform the Department of Finance and Public Credit about the existence of a <i>fideicomiso</i> carrying out business activities.</li> <li>• Any other <i>fideicomiso</i> will not require disclosure nor reporting</li> </ul>
<b>CONFIDENTIALITY</b>	<p>Trusts are confidential and the information concerning them will only be disclosed if the law requires so.</p>	<p><i>Fideicomisos</i> are confidential (art. 117 LIC), but the fiduciary will be forced to disclose the information to specific authorities if the law requires so. Some <i>fideicomisos</i> require an authorization to be created.</p>

<p><b>TAX TREATMENT</b></p>	<p>Although it could vary from one jurisdiction to another, in general terms:</p> <ul style="list-style-type: none"> <li>• Settlor and beneficiaries are subject to personal taxation and may be taxed on trust capital and income.</li> <li>• Revocable Trust: the settlor will be the taxpayer.</li> <li>• Irrevocable Trusts: the trustees will pay taxes from the Trust's assets. Beneficiaries will pay taxes upon distribution (depending on the type of Trust).</li> <li>• Charitable trusts are exempt from most taxes<sup>155</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Fideicomitentes</i> and <i>Fideicomisarios</i> are subject to income tax on capital gains on the transfer of property in <i>fideicomiso</i>.</li> <li>• <i>Fideicomisarios</i> are subject to income tax on income derived from the <i>fideicomiso</i> operations.</li> <li>• <i>Fideicomitentes</i> are subject to income tax on income derived from the lease trust property in a revocable <i>fideicomiso</i>.</li> <li>• <i>Fideicomisarios</i> are subject to income tax on income derived from the lease of trust property in an irrevocable <i>fideicomiso</i>.</li> <li>• Charitable <i>fideicomisos</i> or foundations authorized to receive donations are exempt from income and other taxes.</li> </ul>
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<sup>155</sup> WATT, Op.cit., p.46

## CONCLUSIONS

The institution of the *fideicomiso* has existed for centuries, developed since Roman times and in several jurisdictions; such as the German and the Anglo-Saxon. In this last one, it first started as a figure known as “use”, which later on became to be what we know today as Trusts. It is under the influence of the Trust that the *fideicomiso* was introduced in the legislation of Latin American countries at the beginning of the past century; becoming of high economic importance, mainly in Mexico.

Amongst the countries with a Civil Law system who have adopted the *fideicomiso* as a version of the Trust, it is in Mexico (...) where this institution has had its greatest development<sup>156</sup>; as we can see through the variety of its applications and on the large number of its operations. It is on 1926 that the *fideicomiso* is regulated for the first time in Mexico and it began to be used for both, public and private matters.

Even though the *fideicomiso* has its roots on the Anglo-Saxon Trust, the use of this institution in Mexico is not the same as the use of the Trust in countries with a Common Law jurisdiction, where they are most used for estate planning purposes. By the contrary, in Mexico the *fideicomiso* is most commonly used for business purposes, such as foreign investment and real estate development, amongst others. Nevertheless, the private (individuals) application of the *fideicomiso* has experienced an important development in the past few years. However, it has been mostly seen as a business tool to propel local and foreign investment, by providing investors with benefits and incentives, such as:

- a) Access to sectors of the economy, which are limited to national entities or individuals. This can be the case of oil extraction and refinement, telecommunications, utilities, etc.
- b) A high level of confidentiality to investors or business partners both, local and foreign. This is indeed a valuable attribute for entrepreneurs in Mexico and other Latin American countries, in light of the high insecurity level that unfortunately, such countries are still struggling to control.

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<sup>156</sup> BATIZA Rodolfo, *La hermenéutica jurídica en el fideicomiso y otros ensayos*, Jus, Mexico 1997, p.27

c) Extended payment terms for certain local taxes, depending on specific investment profiles and types of *fideicomiso* (e.g. Income Tax for alienation of property). This treatment ultimately reflects a stronger working capital for individual investors or entities who benefit from *fideicomiso* structures.

As mentioned above, the current use of the *fideicomiso* in Mexico is primarily for business development and real estate transactions; this later being widely used by foreign investors interested in acquiring property within areas restricted to Mexican nationals. In line with this, some of the business areas where the *fideicomiso* is being most commonly used are tourism and real estate development, which have seen an extremely aggressive growth in the country over the past 5 – 10 years. Other important economic activities where the *fideicomiso* is used concern credit guarantees, debts negotiations, pension plans, etc.

Contrary to Trusts, in the *fideicomiso* only a fiduciary institution can perform as trustee (fiduciary). This creates confidence for the legal entities and individuals who use the *fideicomiso*, as the fiduciary is regulated by the law and has the required experience on the field in which the *fideicomiso* is created. It also releases the *fideicomitente* from the complexity that an investment or the management of a business may have, entrusting the fiduciary institution with the achievement of those activities.

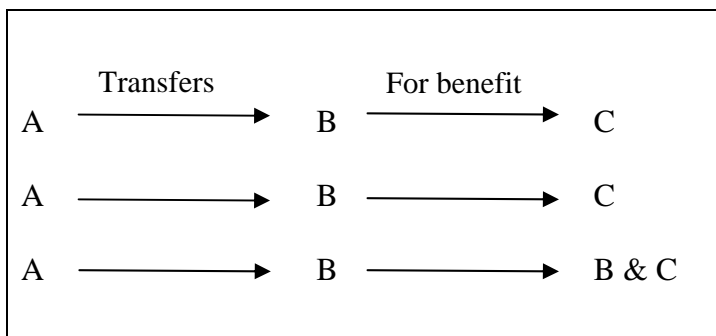
In modern days the *fideicomiso* is more and more important, given the complexity of asset operations; as a consequence of the internationalisation of the economy, the constant changes in the law, and the different limitations (legal and fiscal) that every jurisdiction constantly applies. It is also because of this, that the *fideicomitente* will be more comfortable if it is a competent and professional entity (fiduciary institution) who carries out the fiduciary (trustee) duties, basically in those matters related to the management of assets.

Furthermore, the *fideicomiso* can also be used to protect the assets of an individual or a legal entity. This purpose however, cannot be exercised with the intention of defrauding creditors thus, one has to be very careful when creating a *fideicomiso* that it is not this purpose that the *fideicomitente* had in mind when creating it.

**SCHEDULE 1**

This will be clearer if we explain it as follows:

- a) A may transfer property to B in trust, who is to hold it in trust for the benefit of C;
- b) A may declare that he holds property in trust for C; and
- c) A may transfer property to B in trust, for the benefit of B and C.)



## **SCHEDULE 2**

**Artículo 389 LTOC:** *El fideicomiso cuyo objeto recaiga en bienes muebles, surtirá efectos contra terceros desde la fecha en que se cumplan los requisitos siguientes:*

- I.** *Si se tratare de un crédito no negociable o de un derecho personal, desde que el fideicomiso fuere notificado al deudor;*
- II.** *Si se tratare de un título nominativo, desde que este se endose a la institución fiduciaria y se haga constar en los registros del emisor, en su caso;*
- III.** *Si se tratare de cosa corpórea o de títulos al portador, desde que estén en poder de la institución fiduciaria.*

**Article 389 LTOC:** *The fideicomiso whose object falls on movable assets, will be effective before third parties from the date in which the following requirements are fulfilled:*

- I.** *In case of a non-negotiable credit or a personal right, from the moment in which it be notified to the debtor;*
- II.** *In case of a negotiable instrument, from the moment in which it is assigned to the fiduciary institution and it be stated in the registries of the issuer, where appropriate;*
- III.** *In case of a corporeal thing or negotiable instruments payable to bearer, from the moment in which the fiduciary institution has them.*

### **SCHEDULE 3**

#### **BANCO DE MÉXICO**

##### **CIRCULAR 1/2005 Relativa a las Operaciones de Fideicomiso**

El Banco de México, con fundamento en los artículos 24, 26, 27 y 36 de su Ley; 81, 103 fracción IV y penúltimo párrafo, y 106 fracción XIX inciso a) de la Ley de Instituciones de Crédito; 22 fracción IV inciso d) y 103 fracción IX inciso b) de la Ley del Mercado de Valores; 35 fracción XVI Bis inciso a) y 62 fracción VI inciso a) de la Ley General de Instituciones y Sociedades Mutualistas de Seguros; 16 fracción XV inciso a), y 60 fracción VI Bis inciso a) de la Ley Federal Instituciones de Fianzas, considerando:

- a) Que el 13 de junio de 2003 se publicaron en el Diario Oficial de la Federación modificaciones a diversas leyes financieras en materia de Fideicomisos;
- b) Que dichas reformas tuvieron, entre otros fines, el objetivo de establecer un marco legal más sólido al: i) prohibir que a través del Fideicomiso se realicen operaciones reservadas en la ley a los intermediarios financieros; ii) evitar que mediante dicha figura, los intermediarios realicen operaciones que evadan el cumplimiento de las disposiciones establecidas en sus respectivas leyes o normas, y iii) proporcionar mayor transparencia y protección jurídica a los usuarios de los Fideicomisos;
- c) Que resulta conveniente eliminar las figuras de Fideicomiso abierto y cerrado, toda vez que a través de ellas se pretendió inhibir la realización de ciertas operaciones que actualmente, con motivo de las mencionadas reformas legales, se encuentran prohibidas en las distintas leyes financieras, y
- d) Que estima importante facilitar la consulta de las disposiciones emitidas por el Banco de México aplicables a las operaciones de Fideicomiso que lleven a cabo las entidades financieras que conforme a las leyes le corresponde regular, a través de la emisión de un solo cuerpo normativo en el que se incluyan todas las disposiciones mencionadas, excepto aquéllas dirigidas a las instituciones de banca de desarrollo por la naturaleza particular de tales intermediarios.

Por lo anterior, ha resuelto expedir las siguientes:

**REGLAS A LAS QUE DEBERÁN SUJETARSE LAS INSTITUCIONES DE CRÉDITO; CASAS DE BOLSA; INSTITUCIONES DE SEGUROS; INSTITUCIONES DE FIANZAS, SOCIEDADES FINANCIERAS DE OBJETO LIMITADO Y LA FINANCIERA RURAL, EN LAS OPERACIONES DE FIDEICOMISO.**

#### **1. DEFINICIONES**

Para fines de brevedad en las presentes Reglas se entenderá, en singular o en plural, por:

**Casas de Bolsa:** a las personas morales autorizadas para operar como tales en términos de la Ley del Mercado de Valores.

**Casas de Cambio:** a las personas morales autorizadas para operar como tales en términos de la Ley General de Organizaciones Auxiliares del Crédito.

**Entidad Financiera del Exterior:** a aquella autorizada para actuar como entidad financiera por las autoridades competentes del país en que esté constituida.

**Fideicomiso:** operación en virtud de la cual el fideicomitente transmite a una Institución Fiduciaria la propiedad o titularidad de bienes o derechos para ser destinados a fines lícitos y determinados, encomendando la realización de dichos fines a la propia Institución Fiduciaria.

**Instituciones de Banca de Desarrollo:** a las personas morales autorizadas para actuar con tal carácter, en términos de lo previsto en la Ley de Instituciones de Crédito y en sus Leyes Orgánicas.

**Instituciones de Banca Múltiple:** a las personas morales autorizadas para actuar con tal carácter, en términos de lo previsto en la Ley de Instituciones de Crédito.

**Instituciones de Fianzas:** a las personas morales autorizadas para actuar como tales en términos de la Ley Federal de Instituciones de Fianzas.

**Instituciones de Seguros:** a las personas morales autorizadas para actuar con eses carácter en términos de la Ley General de Instituciones y Sociedades Mutualistas de Seguros.

**Instituciones Fiduciarias:** a las Instituciones de Crédito, Casas de Bolsa, Instituciones de Seguros, Instituciones de Fianzas, Sofoloes y a la Financiera Rural, que llevan a cabo la operación fiduciaria.

**Financiera Rural:** al organismo descentralizado de la Administración Pública Federal, sectorizado en la Secretaría de Hacienda y Crédito Público, con personalidad jurídica y patrimonio propio creado por la Ley Orgánica de la Financiera Rural.

**Mercados Reconocidos:** al MexDer, Mercado Mexicano de Derivados, S.A. de C.V., ubicado en la Ciudad de México, Distrito Federal; al Chicago Mercantile Exchange, Chicago Borrada Options Exchange y Mid America Commodity Exchange que forma parte del Chicago Borrada of Trade, ubicados en la ciudad de Chicago, Illinois, Estados Unidos de América, y al Commodity Exchange Incorporated, ubicado en la ciudad de Nueva Cork, Nueva Cork, Estados Unidos de América.

**Sofoles:** a las personas morales autorizadas para actuar como Sociedades Financieras de Objeto Limitado en términos de la Ley de Instituciones de Crédito.

## **2. DISPOSICIONES GENERALES**

- 2.1 Las disposiciones contenidas en las presentes Reglas regulan aquellos tipos de Fideicomisos que las Instituciones Fiduciarias tienen autorizados a celebrar de conformidad con sus propias leyes y con las disposiciones que de ellas emanen.
- 2.2 Las Instituciones Fiduciarias deberán observar estrictamente los requisitos formales de cada operación para evitar vicios de legalidad.
- 2.3 En caso de existir un Comité Técnico, se deberá prever en el contrato de Fideicomiso por lo menos lo siguiente: i) la forma en que se integrará; ii) la forma en que tomará sus resoluciones, y iii) el mecanismo a través del cual informará el contenido de dichas resoluciones a la institución Fiduciaria y, en su caso, a otras personas.
- 2.4 Las Instituciones Fiduciarias deberán registrar y conservar la constancia de las operaciones que realicen, de conformidad con las leyes que las rigen y las disposiciones de carácter general que al efecto expidan las autoridades.
- 2.5 Las Instituciones Fiduciarias sólo podrán cobrar las comisiones y honorarios que convengan en el contrato de Fideicomiso. Se podrá pactar que el pago de dichas comisiones y honorarios se cargue al patrimonio fideicomitado.
- 2.6 En los Fideicomisos de garantía se deberá prever en el contrato por lo menos lo siguiente: i) las obligaciones cuyo cumplimiento se garantiza con el patrimonio fiduciario; ii) los bienes o derechos que constituyan dicho patrimonio, y iii) la proporción que deberá mantenerse entre el valor de los bienes o derechos que integren el patrimonio fideicomitado y el saldo insoluto de la obligación garantizada.
- 2.7 Lo previsto en las presente Reglas será aplicable a las operaciones de mandato y comisión que lleven a cabo las Instituciones de Crédito y la Financiera Rural.
- 2.8 El destino de los fondos recibidos por las Instituciones de Banca de Desarrollo y la Financiera Rural, en los Fideicomisos destinados al otorgamiento de créditos en su más amplio sentido o para la adquisición, inversión o administración de cualquier clase de valores, así como para llevar a cabo mandatos o comisiones con los fines antes mencionados, deberá comprender un depósito en efectivo sin interés en el Banco de México, por el cincuenta por ciento de los mismos, en una cuenta especial que al efecto el propio Banco de México les lleve.

Dicho depósito deberá constituirse en la fecha o fechas en que se reciban los recursos y mantenerse durante la vigencia del acto o contrato respectivo.

Lo dispuesto en los párrafos anteriores de este numeral, no será aplicable a los Fideicomisos previstos en el Anexo de estas Reglas, así como a los demás Fideicomisos, mandatos o comisiones que obtengan autorización previa a su constitución u otorgamiento y por escrito del Banco de México. Para tales efectos, deberán presentar la solicitud de autorización respectiva acompañada del proyecto de contrato y, en su caso, de las reglas de operación, a la Gerencia de Autorizaciones, Consultas y Control de Legalidad.

- 2.9 El Banco de México podrá autorizar la celebración de operaciones de Fideicomisos en términos distintos a los previstos en estas Reglas. Para ello, las Instituciones Fiduciarias deberán presentar la solicitud de autorización respectiva junto con el proyecto de contrato y, en su caso, de las reglas de operación, a la referida Gerencia de Autorizaciones, Consultas y Control de Legalidad.

### **3. INVERSIÓN Y ADMINISTRACIÓN DE LOS RECURSOS**

- 3.1 Para la inversión y administración del patrimonio fideicomitido, las Instituciones Fiduciarias deberán ajustarse a lo pactado en el contrato de Fideicomiso, en el cual se podrá estipular la posibilidad de recibir instrucciones del fideicomitente, del fideicomisario o del comité técnico.
- 3.2 En el contrato de Fideicomiso se deberá pactar: i) el procedimiento a seguir para invertir los recursos líquidos que integren el patrimonio fideicomitido; ii) la forma como se procederá en caso de que dicha inversión no pueda realizarse conforme al procedimiento previsto; iii) la clase de bienes, derechos o títulos en los que se podrán invertir los recursos líquidos que integren el patrimonio de dicho Fideicomiso; iv) los plazos máximos de las inversiones; v) las características de las contrapartes con quienes tales inversiones podrán realizarse; vi) tratándose de inversiones en valores, títulos de crédito u otros instrumentos financieros, las características de sus emisores y en su caso, la calificación de tales valores, títulos o instrumentos, y vii) que los fondos que reciban las Fiduciarias que no se inviertan de manera inmediata conforme a los fines del Fideicomiso de que se trate, deberán ser depositados en una Institución de Crédito a más tardar el día hábil siguiente al que se reciban, en tanto se aplican al fin pactado en el contrato de Fideicomiso respectivo, así como que de realizarse el depósito en la Institución de Crédito que actúa como Fiduciaria, éste deberá devengar la tasa más alta que dicha Institución pague por operaciones al mismo plazo y monto similar, en las mismas fechas en que se mantenga el depósito.

### **4. OPERACIONES DE LAS INSTITUCIONES FIDUCIARIAS CON OTRAS ENTIDADES**

- 4.1. Las Instituciones Fiduciarias deberán ostentarse como tales ante sus contrapartes en los actos jurídicos que realicen en el cumplimiento de los Fideicomisos que se les encomienden.
- 4.2 Las operaciones con valores, de compraventa de divisas, financieras conocidas como derivadas, así como en general cualquier tipo de inversión financiera que realicen las Instituciones Fiduciarias, deberán llevarse a cabo con alguna Institución de Crédito, Casa de Bolsa o Entidad Financiera del Exterior, debiendo actuar todas estas sociedades a nombre propio. Lo anterior, con excepción de las operaciones financieras conocidas como derivadas que se lleven a cabo en Mercados Reconocidos.

Asimismo, las Instituciones Fiduciarias podrán realizar operaciones de compraventa de divisas directamente con Casas de Cambio y operaciones de compraventa de acciones de sociedades de inversión directamente con las Sociedades Operadoras de Sociedades de Inversión que presten tales servicios.

## **5. MEDIDAS DE TRANSPARENCIA**

- 5.1 Las Instituciones Fiduciarias deberán entregar al fideicomitente y, en su caso, al fideicomisario al momento de la suscripción del contrato de Fideicomiso una copia de éste, así como un inventario de los bienes o derechos que integren el patrimonio del Fideicomiso.
- 5.2 Las Instituciones Fiduciarias deberán establecer en el contrato de Fideicomiso que responderán civilmente por los daños y perjuicios que causen por el incumplimiento de las obligaciones a su cargo asumidas en dicho contrato.
- 5.3 Las Instituciones Fiduciarias deberán establecer en el contrato de Fideicomiso que responderán civilmente por los daños y perjuicios que causen por el incumplimiento de las obligaciones a su cargo asumidas en dicho contrato.
- 5.4 De conformidad con lo dispuesto en los artículos 106 fracción XIX inciso a) de la Ley de Instituciones de Crédito, 103 fracción IX inciso b) de la Ley del Mercado de Valores, 62 fracción VI inciso a) de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, y 60 fracción VI Bis, inciso a) de la Ley Federal de Instituciones de Fianzas, se autoriza a las Instituciones de Banca Múltiple, a las Instituciones de Banca de Desarrollo que corresponda en términos de sus leyes orgánicas, a las Casas de Bolsa, a las Instituciones de Seguros y a las Instituciones de Fianzas, para que en cumplimiento de Fideicomisos puedan llevar a cabo operaciones con la misma institución actuando por cuenta propia, siempre y cuando se trate de operaciones que su ley o disposiciones que emanen de ellas les permitan realizar y se establezcan medidas preventivas para evitar conflictos de interés.

Las Instituciones Fiduciarias, incluyendo aquéllas que estén autorizadas expresamente en la ley que las regula, que en cumplimiento de Fideicomisos puedan llevar a cabo operaciones con la misma institución actuando por cuenta propia, deberán cumplir al menos las medidas preventivas siguientes:

- a) Prever que se podrán realizar las operaciones a que se refiere el presente numeral en el contrato de Fideicomiso;
- b) Pactar en el contrato de Fideicomiso: i) que las operaciones a que se refiere el presente numeral se lleven a cabo previa aprobación expresa que, en cada caso, otorguen el fideicomitente, el fideicomisario o el comité técnico a través de algún medio que deje constancia documental, incluso en medios electrónicos, o bien ii) el tipo de operaciones que podrán realizar con la institución actuando por cuenta propia, y en su caso, sus características;

c) Prever en los contratos de Fideicomiso cláusulas que eviten que los derechos y obligaciones de la Institución Fiduciaria actuando con tal carácter y por cuenta propia se extingan por confusión, y

d) El departamento o área de la Institución Fiduciaria que actúe por cuenta propia y el departamento o área fiduciaria de dicha Institución, no deberán ser dependientes directamente entre ellas.

En todos los casos, las medidas preventivas deberán constar de manera notoria en el contrato de Fideicomiso.

5.5 Las Instituciones Fiduciarias deberán insertar de forma notoria en los contratos de Fideicomiso que celebren, las prohibiciones a que están sujetas conforme a sus respectivas Leyes, o las que le sean aplicables supletoriamente, así como las previstas en estas Reglas

5.6 Las Instituciones Fiduciarias que reciban o administren recursos públicos deberán, en sus operaciones financieras y en el análisis, otorgamiento, seguimiento y recuperación de los financiamientos que otorguen, observar al menos lo siguiente:

a) Contar con lineamientos y/o políticas fundamentados en sanas prácticas financieras, en principios de carácter prudencial, de transparencia y de rendición de cuentas. Lo anterior deberá ser autorizado por su comité técnico, o estar previsto en el contrato de Fideicomiso, mandato o comisión, y

b) Delimitar claramente las funciones y responsabilidades de áreas y funcionarios involucrados en sus actividades financieras, con el objeto de evitar posibles conflictos de interés.

## **6. PROHIBICIONES**

6.1 En la celebración de Fideicomisos, las Instituciones Fiduciarias tendrán prohibido lo siguiente:

a) Cargar al patrimonio fideicomitado precios distintos a los pactados al concertar la operación de que se trate;

b) Garantizar la percepción de rendimientos o precios por los fondos cuya inversión se les encomiende, y

c) Realizar operaciones en condiciones y términos contrarios a sus políticas internas y a las sanas prácticas financieras.

6.2 Las Instituciones Fiduciarias no podrán celebrar operaciones con valores, títulos de crédito o cualquier otro instrumento financiero, que no cumplan con las especificaciones que se hayan pactado en el contrato de Fideicomiso correspondiente.

- 6.3 Las Instituciones Fiduciarias no podrán llevar a cabo tipos de Fideicomiso que no estén autorizadas a celebrar de conformidad con las leyes y disposiciones que las regulan.
- 6.4 En ningún caso las Instituciones Fiduciarias podrán cubrir con cargo al patrimonio fideicomitado el pago de cualquier sanción que les sea impuesta a dichas Instituciones por alguna autoridad.
- 6.5 En los Fideicomisos de garantía, las Instituciones de Fianzas y las Sofoles no podrán recibir sino bienes o derechos que tengan por objeto garantizar las obligaciones de que se trate.
- 6.6 Las Instituciones Fiduciarias deberán observar lo dispuesto en los artículos 106 fracción XIX de la Ley de Instituciones de Crédito, 103 fracción IX de la Ley del Mercado de Valores, 62 fracción VI de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, 60 fracción VI Bis de la Ley Federal de Instituciones de Fianzas y 16 de la Ley Orgánica de la Financiera Rural, según corresponda a cada Institución.

## **7. INFORMACIÓN**

Las Instituciones Fiduciarias deberán proporcionar a la Dirección de Información del Sistema Financiero del Banco de México, la información sobre los Fideicomisos que celebren o administren en la forma y plazos que, en su caso, ésta les requiera.

Sin perjuicio de lo anterior, la Gerencia de Banca de Desarrollo podrá solicitar la información sobre los Fideicomisos que celebren o administren las Instituciones de Banca de Desarrollo y la Financiera Rural, en la forma y plazos que, en su caso, ésta les requiera.

## **8. SANCIONES**

- 8.1 Las Instituciones de Crédito y las Casas de Bolsa que incumplan las disposiciones contenidas en las presentes Reglas serán sancionadas por el Banco de México de conformidad con la Ley que lo regula y las demás disposiciones aplicables. Lo anterior, sin perjuicio de las facultades que las leyes otorguen a las demás autoridades.
- 8.2 Las Sofoles que incumplan las disposiciones contenidas en las presentes Reglas, serán sancionadas por la Comisión Nacional Bancaria y de Valores conforme a la Ley de Instituciones de Crédito.
- 8.3 Las Instituciones de Seguros y las Instituciones de Fianzas que incumplan las disposiciones contenidas en las presentes Reglas, serán sancionadas por la Comisión Nacional de Seguros y Fianzas conforme a la Ley General de Instituciones y Sociedades Mutualistas de Seguros y a la Ley Federal de Instituciones de Fianzas.

- 8.4 Los incumplimientos de la Financiera Rural a las disposiciones contenidas en las presentes Reglas, serán sancionados por la Comisión Nacional Bancaria y de Valores conforme a la Ley Orgánica de la Financiera Rural.

## ANEXO

### **FIDEICOMISOS NO SUJETOS A LOS SEÑALADOS EN EL NUMERAL 2.8**

1. Los Los fideicomisos, mandatos o comisiones, de inversión, cuyos recursos en moneda nacional o en moneda extranjera se reciban exclusivamente de personas plenamente identificadas al celebrar la operación y que se destinen a adquirir y/o administrar valores, no permitiéndose la adhesión de terceros una vez constituidos.
2. Los fideicomisos constituidos por el Gobierno Federal a través de la Secretaría de Hacienda y Crédito Público
3. Los fideicomisos constituidos por los gobiernos de las entidades federativas o por los municipios, con objeto de realizar actividades públicas o de fomento y desarrollo económico en la propia entidad o municipio y que reciban recursos únicamente del Gobierno Federal o del gobierno de las entidades federativas o municipales, en su carácter de fideicomitentes.

Además, tales fideicomisos podrán recibir recursos en moneda nacional o extranjera de personas distintas, por el producto de la colocación de valores que, en su caso, se lleve a cabo en términos del contrato de fideicomiso respectivo, y por los accesorios financieros derivados de las inversiones que respecto al patrimonio fideicomitado se realicen, por lo que cualquier otro recurso, bien o derecho que se reciba, deberá ser aportado con el carácter de donación a título gratuito.

4. Los fideicomisos que de acuerdo con las leyes federales tengan un régimen especial de inversión, como el considerado en el artículo 33 de la Ley del Impuesto Sobre la Renta, así como aquéllos constituidos en moneda nacional en los cuales -para cumplir con prestaciones laborales de carácter general- se reciban aportaciones únicamente de las empresas, de sus sindicatos o de los trabajadores de éstas, para otorgar créditos a estos últimos.
5. Los fideicomisos autorizados por la Tesorería de la Federación para operar cuentas para garantizar el interés fiscal, las operaciones de comercio exterior, así como aquellos para llevar cuentas aduaneras de garantía.
6. Los fideicomisos cuyo patrimonio se constituya con la cartera de créditos cedida sin responsabilidad y cuyo pago al cedente se efectúe con los recursos que obtenga el fiduciario de la emisión que realice de valores que se inscriban en el Registro Nacional de Valores de conformidad con lo previsto en la Ley del Mercado de Valores.
7. Los fideicomisos que en términos del artículo 55 BIS de la Ley de Instituciones de Crédito, las instituciones constituyan dentro de la propia institución.

8. Aquellos Fideicomisos que se sujeten a los contratos marco aprobados por el Banco de México.
9. Los fideicomisos en moneda nacional constituidos ajustándose a las disposiciones a que se refiere el Decreto Presidencial publicado en el Diario Oficial de la Federación el 15 de agosto de 1988, relativo a la inversión de valores por parte de servidores públicos.
10. Los fideicomisos que, en términos del primer párrafo de la OCTAVA de las Reglas a las que habrán de sujetarse las sociedades y fideicomisos que intervengan en el establecimiento y operación de un mercado de futuros y opciones cotizados en bolsa publicadas en el Diario Oficial de la Federación el 31 de diciembre de 1996 y sus modificaciones, prevean la posibilidad de que se adhieran terceros con el carácter tanto de fideicomitentes, como de fideicomisarios.

## **TRANSITORIOS**

**PRIMERO.-** Las presentes Reglas entrarán en vigor el 11 de julio de 2005.

**SEGUNDO.-** Para las instituciones de banca múltiple a partir del 11 de julio de 2005, se derogan los numerales M.31. a M.31.4, M.41.2 y M.42.3 de la Circular 2019/95 dirigida a esas instituciones, y para las instituciones de banca de desarrollo a partir del 1° de febrero de 2006 se abroga la Circular-Telefax 15/2005 de fecha 8 de julio de 2005, dirigida a esas instituciones de banca de desarrollo. Lo anterior, salvo por lo dispuesto en el numeral M.31.16. de dichas Circular y Circular-Telefax, relativo a los "Fideicomisos en los que se administren sumas de dinero que aporten periódicamente grupos de consumidores integrados mediante sistemas de comercialización, destinados a la adquisición de bienes muebles nuevos y/o a la prestación de servicios no inmobiliarios, en términos del Artículo 63 de la Ley Federal de Protección al Consumidor y demás disposiciones relativas.

Lo señalado en el párrafo anterior, en el entendido de que los Fideicomisos a que hace referencia el numeral M.31.16., que no se sujeten a lo dispuesto en dicho numeral, así como aquellos Fideicomisos en los que se administren sumas de dinero que aporten periódicamente grupos de consumidores integrados mediante sistemas de comercialización, destinados a la adquisición de otro tipo de bienes y/o a la prestación de servicios inmobiliarios, deberán realizar un depósito en efectivo sin interés en Banco de México, por el cincuenta por ciento de los fondos recibidos en los Fideicomisos señalados. Dicho depósito deberá constituirse en una cuenta especial que al efecto el Banco de México lleve a las instituciones de crédito, en la fecha en que se reciban los recursos y mantenerse durante la vigencia del acto o contrato respectivo.

**TERCERO.** A partir de la entrada en vigor de las presentes Reglas queda derogado el numeral CB.4 de la Circular 115/2002 de fecha 31 de octubre de 2002 dirigida a las casas de bolsa, y se abrogan las "Reglas a las que deberán sujetarse las Instituciones de Seguros al actuar como fiduciarias", así como las "Reglas a las que deberán sujetarse las Instituciones de Fianzas al actuar como fiduciarias", ambas publicadas en el Diario Oficial de la Federación el 4 de abril de 2000.

## **SCHEDULE 4**

### **Ley General de Títulos y Operaciones de Crédito (LTOC)**

#### **CAPITULO V**

##### **Sección Primera**

##### **Del fideicomiso**

**Artículo 381.-** En virtud del fideicomiso, el fideicomitente transmite a una institución fiduciaria la propiedad o la titularidad de uno o más bienes o derechos, según sea el caso, para ser destinados a fines lícitos y determinados, encomendando la realización de dichos fines a la propia institución fiduciaria.

**Artículo 382.-** Pueden ser fideicomisarios las personas que tengan la capacidad necesaria para recibir el provecho que el fideicomiso implica.

El fideicomisario podrá ser designado por el fideicomitente en el acto constitutivo del fideicomiso o en un acto posterior.

El fideicomiso será válido aunque se constituya sin señalar fideicomisario, siempre que su fin sea lícito y determinado, y conste la aceptación del encargo por parte del fiduciario.

Es nulo el fideicomiso que se constituye a favor del fiduciario, salvo lo dispuesto en el párrafo siguiente, y en las demás disposiciones legales aplicables.

La institución fiduciaria podrá ser fideicomisaria en los fideicomisos que tengan por fin servir como instrumentos de pago de obligaciones incumplidas, en el caso de créditos otorgados por la propia institución para la realización de actividades empresariales. En este supuesto, las partes deberán convenir los términos y condiciones para dirimir posibles conflictos de intereses.

**Artículo 383.-** El fideicomitente puede designar varios fideicomisarios para que reciban simultánea o sucesivamente el provecho del fideicomiso, salvo el caso de la fracción II del artículo 394.

Cuando sean dos o más fideicomisarios y deba consultarse su voluntad, en cuanto no esté previsto en el fideicomiso, las decisiones se tomarán por mayoría de votos computados por representaciones y no por personas. En caso de empate, decidirá el juez de primera instancia del lugar del domicilio del fiduciario.

**Artículo 384.-** Sólo pueden ser fideicomitentes las personas con capacidad para transmitir la propiedad o la titularidad de los bienes o derechos objeto del fideicomiso, según sea el caso, así como las autoridades judiciales o administrativas competentes para ello.

**Artículo 385.-** Sólo pueden ser instituciones fiduciarias las expresamente autorizadas para ello conforme a la ley.

En el fideicomiso podrán intervenir varias instituciones fiduciarias para que conjunta o sucesivamente desempeñen el cargo de fiduciario, estableciendo el orden y las condiciones en que hayan de substituirse.

Salvo lo que se prevea en el fideicomiso, cuando por renuncia o remoción la institución fiduciaria concluya el desempeño de su cargo, deberá designarse a otra institución fiduciaria que la substituya. Si no fuere posible esta substitución, el fideicomiso se dará por extinguido.

**Artículo 386.-** Pueden ser objeto del fideicomiso toda clase de bienes y derechos, salvo aquellos que, conforme a la ley, sean estrictamente personales de su titular.

Los bienes que se den en fideicomiso se considerarán afectos al fin a que se destinan y, en consecuencia, sólo podrán ejercitarse respecto a ellos los derechos y acciones que al mencionado fin se refieran, salvo los que expresamente se reserve el fideicomitente, los que para él deriven del fideicomiso mismo o los adquiridos legalmente respecto de tales bienes, con anterioridad a la constitución del fideicomiso, por el fideicomisario o por terceros. La institución fiduciaria deberá registrar contablemente dichos bienes o derechos y mantenerlos en forma separada de sus activos de libre disponibilidad.

El fideicomiso constituido en fraude de terceros, podrá en todo tiempo ser atacado de nulidad por los interesados.

**Artículo 387.-** La constitución del fideicomiso deberá constar siempre por escrito.

**Artículo 388.-** El fideicomiso cuyo objeto recaiga en bienes inmuebles, deberá inscribirse en la Sección de la Propiedad del Registro Público del lugar en que los bienes estén ubicados. El fideicomiso surtirá efectos contra tercero, en el caso de este artículo, desde la fecha de inscripción en el Registro.

**Artículo 389.-** El fideicomiso cuyo objeto recaiga en bienes muebles, surtirá efectos contra tercero desde la fecha en que se cumplan los requisitos siguientes:

**I.-** Si se tratare de un crédito no negociable o de un derecho personal, desde que el fideicomiso fuere notificado al deudor;

**II.-** Si se tratare de un título nominativo, desde que éste se endose a la institución fiduciaria y se haga constar en los registros del emisor, en su caso;

**III.-** Si se tratare de cosa corpórea o de títulos al portador, desde que estén en poder de la institución fiduciaria.

**Artículo 390.-** El fideicomisario tendrá, además de los derechos que se le concedan por virtud del acto constitutivo del fideicomiso, el de exigir su cumplimiento a la institución fiduciaria; el de atacar la validez de los actos que ésta cometa en su perjuicio, de mala fe o en exceso de las facultades que por virtud del acto constitutivo o de la ley le corresponda, y cuando ello sea procedente, el de reivindicar los bienes que a consecuencia de esos actos hayan salido del patrimonio objeto del fideicomiso.

Cuando no exista fideicomisario determinado o cuando éste sea incapaz, los derechos a que se refiere el párrafo anterior, corresponderán al que ejerza la patria potestad, al tutor o al Ministerio Público, según el caso.

**Artículo 391.-** La institución fiduciaria tendrá todos los derechos y acciones que se requieran para el cumplimiento del fideicomiso, salvo las normas o limitaciones que se establezcan al efecto, al constituirse el mismo; estará obligada a cumplir dicho fideicomiso conforme al acto constitutivo; no podrá excusarse o renunciar su encargo sino por causas graves a juicio de un Juez de Primera Instancia del lugar de su domicilio, y deberá obrar siempre como buen padre de familia, siendo responsable de las pérdidas o menoscabos que los bienes sufran por su culpa.

**Artículo 392.-** El fideicomiso se extingue:

**I.-** Por la realización del fin para el cual fue constituido;

**II.-** Por hacerse éste imposible;

**III.-** Por hacerse imposible el cumplimiento de la condición suspensiva de que dependa o no haberse verificado dentro del término señalado al constituirse el fideicomiso o, en su defecto, dentro del plazo de 20 años siguientes a su constitución;

**IV.-** Por haberse cumplido la condición resolutoria a que haya quedado sujeto;

**V.** Por convenio escrito entre fideicomitente, fiduciario y fideicomisario;

**VI.** Por revocación hecha por el fideicomitente, cuando éste se haya reservado expresamente ese derecho al constituir el fideicomiso;

**VII.** En el caso del párrafo final del artículo 386, y

**VIII.** En el caso del artículo 392 Bis.

**Artículo 392 Bis.-** En el supuesto de que a la institución fiduciaria no se le haya cubierto la contraprestación debida, en los términos establecidos en el contrato respectivo, por un periodo igual o superior a tres años, la institución fiduciaria podrá dar por terminado, sin responsabilidad, el fideicomiso.

En el supuesto a que se refiere el párrafo anterior, la institución fiduciaria deberá notificar al fideicomitente y al fideicomisario su decisión de dar por terminado el fideicomiso por falta de pago de las contraprestaciones debidas por su actuación como fiduciario y establecer un plazo de quince días hábiles para que los mismos puedan cubrir los adeudos, según corresponda. En el caso de que, transcurrido el citado plazo, no se hayan cubierto las contraprestaciones debidas, la institución fiduciaria transmitirá los bienes o derechos en su poder en virtud del fideicomiso, al fideicomitente o al fideicomisario, según corresponda. En el evento de que, después de esfuerzos razonables, la institución fiduciaria no pueda encontrar o no tenga noticias del fideicomitente o fideicomisario para efectos de lo anterior y siempre que haya transcurrido el plazo señalado sin haber recibido la contraprestación correspondiente, estará facultada para abonar los referidos bienes, cuando éstos se traten de recursos líquidos entre las opciones disponibles

que maximicen la recuperación, a la cuenta global de la institución a que se refiere el artículo 61 de la Ley de Instituciones de Crédito, en cuyo caso los mencionados recursos se sujetarán a las disposiciones aplicables a la citada cuenta global. Tratándose de bienes que no sean recursos líquidos, la institución fiduciaria, sin responsabilidad alguna, estará facultada para enajenar los mismos y convertirlos en recursos líquidos, para su posterior abono en la cuenta global en los términos señalados. Contra los recursos líquidos que se obtengan, podrán deducirse los gastos relacionados con la recuperación.

Para efectos de este artículo se entenderá que se realizaron esfuerzos razonables por parte de la institución fiduciaria cuando se observe el procedimiento de notificación previsto en el artículo 1070 del Código de Comercio.

**Artículo 393.-** Extinguido el fideicomiso, si no se pactó lo contrario, los bienes o derechos en poder de la institución fiduciaria serán transmitidos al fideicomitente o al fideicomisario, según corresponda. En caso de duda u oposición respecto de dicha transmisión, el juez de primera instancia competente en el lugar del domicilio de la institución fiduciaria, oyendo a las partes, resolverá lo conducente.

Para que la transmisión antes citada surta efectos tratándose de inmuebles o de derechos reales impuestos sobre ellos, bastará que la institución fiduciaria así lo manifieste y que esta declaración se inscriba en el Registro Público de la Propiedad en que aquél hubiere sido inscrito.

Las instituciones fiduciarias indemnizarán a los fideicomitentes por los actos de mala fe o en exceso de las facultades que les corresponda para la ejecución del fideicomiso, por virtud del acto constitutivo o de la ley, que realicen en perjuicio de éstos.

**Artículo 394.-** Quedan prohibidos:

**I.-** Los fideicomisos secretos;

**II.-** Aquellos en los cuales el beneficio se conceda a diversas personas sucesivamente que deban substituirse por muerte de la anterior, salvo el caso de que la substitución se realice en favor de personas que estén vivas o concebidas ya, a la muerte del fideicomitente; y

**III.** Aquéllos cuya duración sea mayor de cincuenta años, cuando se designe como beneficiario a una persona moral que no sea de derecho público o institución de beneficencia. Sin embargo, pueden constituirse con duración mayor de cincuenta años cuando el fin del fideicomiso sea el mantenimiento de museos de carácter científico o artístico que no tengan fines de lucro.

## **Sección Segunda**

### **Del fideicomiso de garantía**

**Artículo 395.-** Sólo podrán actuar como fiduciarias de los fideicomisos que tengan como fin garantizar al fideicomisario el cumplimiento de una obligación y su preferencia en el pago, previstos en esta Sección Segunda, las instituciones y sociedades siguientes:

**I.** Instituciones de crédito;

- II. Instituciones de seguros;
- III. Instituciones de fianzas;
- IV. Casas de bolsa;
- V. Sociedades financieras de objeto múltiple a que se refiere el artículo 87-B de la Ley General de Organizaciones y Actividades Auxiliares del Crédito;
- VI. Almacenes generales de depósito, y
- VII. Uniones de crédito.

Las instituciones fiduciarias a que se refieren las fracciones II a IV y VI de este artículo, se sujetarán a lo que dispone el artículo 85 Bis de la Ley de Instituciones de Crédito.

**Artículo 396.-** Las instituciones y sociedades mencionadas en el artículo anterior, podrán reunir la calidad de fiduciarias y fideicomisarias, tratándose de fideicomisos cuyo fin sea garantizar obligaciones a su favor. En este supuesto, las partes deberán convenir los términos y condiciones para dirimir posibles conflictos de intereses.

**Artículo 397.-** Cuando así se señale, un mismo fideicomiso podrá ser utilizado para garantizar simultánea o sucesivamente diferentes obligaciones que el fideicomitente contraiga, con un mismo o distintos acreedores, a cuyo efecto cada fideicomisario estará obligado a notificar a la institución fiduciaria que la obligación a su favor ha quedado extinguida, en cuyo caso quedarán sin efectos los derechos que respecto de él se derivan del fideicomiso. La notificación deberá entregarse mediante fedatario público a más tardar a los cinco días hábiles siguientes a la fecha en la que se reciba el pago.

A partir del momento en que el fiduciario reciba la mencionada notificación, el fideicomitente podrá designar un nuevo fideicomisario o manifestar a la institución fiduciaria que se ha realizado el fin para el cual fue constituido el fideicomiso.

El fideicomisario que no entregue oportunamente al fiduciario la notificación a que se refiere este artículo, resarcirá al fideicomitente los daños y perjuicios que con ello le ocasione.

**Artículo 398.-** Tratándose de fideicomisos de garantía sobre bienes muebles, las partes podrán convenir que el o los fideicomitentes tendrán derecho a:

- I. Hacer uso de los bienes fideicomitados, los combinen o empleen en la fabricación de otros bienes, siempre y cuando en estos dos últimos supuestos su valor no disminuya y los bienes producidos pasen a formar parte del fideicomiso de garantía en cuestión;
- II. Percibir y utilizar los frutos y productos de los bienes fideicomitados, y
- III. Instruir al fiduciario la enajenación de los bienes fideicomitados, sin responsabilidad para éste, siempre y cuando dicha enajenación sea acorde con el curso normal de las actividades del fideicomitente. En estos casos cesarán los efectos de la garantía fiduciaria y

los derechos de persecución con relación a los adquirentes de buena fe, quedando afectos al fideicomiso los bienes o derechos que el fiduciario reciba o tenga derecho a recibir en pago por la enajenación de los referidos bienes.

El derecho que tengan el o los fideicomitentes para instruir al fiduciario la enajenación de los bienes muebles materia del fideicomiso conforme al párrafo anterior, quedará extinguido desde el momento en que se inicie el procedimiento previsto en el artículo 403 de esta Ley, o bien cuando el fiduciario tenga conocimiento del inicio de cualquiera de los procedimientos de ejecución previstos en el Libro Quinto Título Tercero Bis del Código de Comercio.

**Artículo 399.-** Para efectos de lo dispuesto en el artículo anterior, las partes deberán convenir desde la constitución del fideicomiso:

- I. En su caso, los lugares en que deberán encontrarse los bienes fideicomitados;
- II. Las contraprestaciones mínimas que deberá recibir el fiduciario por la venta o transferencia de los bienes muebles fideicomitados;
- III. La persona o personas a las que el fiduciario, por instrucciones del fideicomitente, podrá vender o transferir dichos bienes, pudiendo, en su caso, señalar las características o categorías que permitan identificarlas, así como el destino que el fiduciario deberá dar al dinero, bienes o derechos que reciba en pago;
- IV. La información que el fideicomitente deberá entregar al fideicomisario sobre la transformación, venta o transferencia de los mencionados bienes;
- V. La forma de valorar los bienes fideicomitados, y
- VI. Los términos en los que se acordará la revisión del aforo pactado, en el caso de que el bien o bienes dados en garantía incrementen su valor.

En caso de incumplimiento a los convenios celebrados con base en este artículo, el crédito garantizado por el fideicomiso se tendrá por vencido anticipadamente.

**Artículo 400.-** Las partes podrán convenir que la posesión de bienes en fideicomiso se tenga por terceros o por el fideicomitente.

Cuando corresponda al fideicomitente o a un tercero la posesión material de los bienes fideicomitados, la tendrá en calidad de depósito y estará obligado a conservarlos como si fueran propios, a no utilizarlos para objeto diverso de aquel que al efecto hubiere pactado y a responder de los daños que se causen a terceros al hacer uso de ellos. Tal responsabilidad no podrá ser exigida al fiduciario.

En este caso, serán por cuenta del fideicomitente los gastos necesarios para la debida conservación, reparación, administración y recolección de los bienes fideicomitados.

Si los bienes fideicomitados se pierden o se deterioran, el fideicomisario tiene derecho de exigir al fideicomitente, cuando éste sea el deudor de la obligación garantizada, la

transmisión en fideicomiso de otros bienes o el pago de la deuda aun antes del plazo convenido.

**Artículo 401.-** Los riesgos de pérdida, daño o deterioro del valor de los bienes fideicomitados corren por cuenta de la parte que esté en posesión de los mismos, debiendo permitir a las otras partes inspeccionarlos a efecto de verificar, según corresponda, su peso, cantidad y estado de conservación general.

De convenirse así en el contrato, si el valor de mercado de los bienes fideicomitados disminuye de manera que no baste a cubrir el importe del principal y los accesorios de la deuda que garantizan, el deudor podrá dar bienes adicionales para restituir la proporción original. En caso contrario, el crédito podrá darse por vencido anticipadamente, teniendo el acreedor que notificar al deudor de ello judicialmente o a través de fedatario.

**Artículo 402.-** En caso de incumplimiento de la obligación garantizada, si el depositario se niega a devolver al fiduciario los bienes depositados, su restitución se tramitará de conformidad con lo establecido en el Libro Quinto Título Tercero Bis del Código de Comercio.

**Artículo 403.-** En el fideicomiso de garantía, las partes podrán convenir la forma en que la institución fiduciaria procederá a enajenar extrajudicialmente, a título oneroso, los bienes o derechos en fideicomiso, siempre que, cuando menos, se pacte lo siguiente:

**I.** Que la institución fiduciaria inicie el procedimiento de enajenación extrajudicial del o los bienes o derechos en fideicomiso, cuando reciba del o los fideicomisarios comunicación por escrito en la que soliciten la mencionada enajenación y precisen el incumplimiento de la o las obligaciones garantizadas;

**II.** Que la institución fiduciaria comunique por escrito al o los fideicomitentes en el domicilio señalado en el fideicomiso o en acto posterior, la solicitud prevista en la fracción anterior, junto con una copia de la misma, quienes únicamente podrán oponerse a la enajenación, si exhiben el importe del adeudo, acreditan el cumplimiento de la o las obligaciones precisadas en la solicitud por el o los fideicomisarios de conformidad con la fracción anterior, o presentan el documento que compruebe la prórroga del plazo o la novación de la obligación;

**III.** Que sólo en caso de que el o los fideicomitentes no acrediten, de conformidad con lo previsto en la fracción anterior, el cumplimiento de la o las obligaciones garantizadas o, en su caso, su novación o prórroga, la institución fiduciaria procederá a enajenar extrajudicialmente el o los bienes o derechos fideicomitados, en los términos y condiciones pactados en el fideicomiso, y

**IV.** Los plazos para llevar a cabo los actos señalados en las fracciones anteriores.

El texto que contenga el convenio de enajenación extrajudicial a que se refiere este artículo deberá incluirse en una sección especial del fideicomiso de garantía, la que contará con la firma del fideicomitente, que será adicional a aquélla con que haya suscrito dicho fideicomiso.

A falta del convenio previsto en este artículo, se seguirán los procedimientos establecidos en el Libro Quinto Título Tercero Bis del Código de Comercio para la realización de los siguientes actos:

a) La enajenación de los bienes en fideicomiso que en su caso deba llevar a cabo el fiduciario, o

b) La tramitación del juicio que se promueva para oponerse a la ejecución del fideicomiso.

**Artículo 404.-** Cuando el fideicomiso de garantía se refiera a bienes muebles y su monto sea igual o superior al equivalente en moneda nacional a doscientas cincuenta mil unidades de inversión, las partes deberán ratificar sus firmas ante fedatario público.

**Artículo 405.-** Las acciones de los acreedores garantizados con fideicomiso de garantía prescriben en tres años contados desde la fecha en que se haya dado por vencida la obligación garantizada. En este caso se extinguirá el derecho a pedir su cumplimiento y se revertirá la propiedad de los bienes objeto de la garantía al patrimonio del fideicomitente.

**Artículo 406.-** Al que teniendo la posesión material de los bienes objeto de garantías otorgadas mediante fideicomiso de garantía transmita, grave o afecte la propiedad o posesión de los mismos, en términos distintos a los previstos en la ley, sustraiga sus componentes o los desgaste fuera de su uso normal o por alguna razón disminuya intencionalmente el valor de los mismos, se le sancionará con prisión hasta de un año y multa de cien veces el salario mínimo general diario vigente en el Distrito Federal, cuando el monto de la garantía no exceda del equivalente a doscientas veces de dicho salario.

Si dicho monto excede de esta cantidad, pero no de diez mil, la prisión será de uno a seis años y la multa de cien a ciento ochenta veces el salario mínimo general diario vigente en el Distrito Federal. Si el monto es mayor de diez mil veces de dicho salario, la prisión será de seis a doce años y la multa de ciento veinte veces el salario mínimo general diario vigente en el Distrito Federal.

**Artículo 407.-** El fideicomiso de garantía se registrará por lo dispuesto en esta sección y, sólo en lo que no se oponga a ésta, en la sección primera anterior.

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