

Articles



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Re Tech - Real Estate Tokenization in Argentina

Legal Framework

As a consequence of the pandemic, we have experienced a new trend in the Argentinian real estate market which, slowly though continuously, has now begun to grow: the use of crypto assets¹ to finance construction of real estate projects. In other words, it is a digital assets' offer made by developers, within a *blockchain* technology network, representing interests in construction works investments.

As in other parts of the world, crypto assets used for real estate market financing are known as *tokens*², also referred to as *asset tokens*, as they grant rights in the offeror's projects to those who have acquired them. *Tokenization* of assets entails the creation of "units of value" representing certain tangible or intangible property, or certain interests in a given contract. This is the case of real estate tokenization, with "units of value" or tokens representing (in general) a fraction or square foot of real property, or incomes in a given trust agreement, as explained below.

Nonetheless, before describing how these transactions are carried out nowadays in Argentina, it is worth noting that, at present, there are no legally agreed definitions in Argentina for crypto assets, tokens, tokenization, and the like. Hence, real estate tokenization, as many other businesses in the fintech industry, are governed by certain constitutional principles, such as the principle of legality (i.e. no punishment

¹ In view of the fact that there is no uniform definition in place in Argentina at present, we may consider the only one published, that is, the one arising from Bill 6055-D-2020 submitted to the Argentinian Congress by the political party currently in office: *"Digital representation of value as an encrypted financial asset, defined by a computational protocol which may be used for e-commerce and which is aimed at serving as a means of exchange and/or payment and/or account unit and/or value reserve and/or financial investment tool and/or financing means, which is not legal currency and which is decentralized in nature, with its value subject to varying prices depending on supply and demand changes prevailing in the markets"* (Section 3.1).

² *"Intangible property with numeric form whereby rights are granted or expectations are attributed concerning potential participation in value appreciation or profitability of investment projects ..."* (Section 3.8, Bill No. 6055-D-2020).

without prior law) and the principle of reserve of law, both of them enshrined by Articles 18 and 19 of the National Constitution.³

In this regard, as compared to other regulations (e.g. Spain), real estate tokenization in Argentina, as well as tokenization of other assets (i.e. soybean crops, cattle breeding, wine, etc.) is actually subject to a legal loophole.

In that context, the legislative trend in other countries which have attained greater development in this area (e.g. the USA) indicates that, in principle, any token could be considered as a negotiable instrument or security and their issuance should be subject to the authority of governmental agencies regulating stock market transactions. As an exception, any form of tokenization as would not fall within the scope of parameters fixed by such agencies would not be governed by their rules.

This means that the legal analysis must be made on a case-by-case basis, so as to determine whether the tokenization transaction intended to be carried out by the businessperson could be subject to capital markets rules or not.

This circumstance triggers the first question: what legal concepts should be analyzed so as to determine whether real estate tokenization of a given project could qualify as a stock exchange transaction or not?

A first practical exercise consists in seeking proper advice from legal counsel and then comparing the nature and features of the token to be issued against the security definition established by the Civil and Commercial Code of Argentina (CCC) and the Capital Markets Law (CML); determining whether a public offering exists or not; determining whether there is an investment agreement in place or not; determining whether a secondary market exists or not in connection with transmission of tokens; determining whether the Argentinian Securities and Exchange Commission (CNV, for its Spanish acronym) regulations in connection with real estate financial trusts are applicable to the project or not, among other matters.

If most questions above have a negative answer, we could analyze a second question. This is because, even if there are no regulations established by the CNV as concerns tokenization, such legal loophole existing in this connection will not exempt serious and good businesspersons from their obligation to assess other regulations as could be eventually applicable to their businesses, according to the CNV interpretation.

³ In particular, where the Constitution of Argentina establishes that: *"No inhabitants of Argentina may be obliged to do what is not mandated by the law, or forbidden from doing what is not prohibited by the law."* (Article 19)

Once the CNV issue has been overcome -in the case of a private offering of tokens, for instance - the second question is posed: which agreements are presently used by the real estate market in order to tokenize projects? Well then, the typical **management trust agreement** has appeared as the answer, at least until an answer is eventually provided by lawmakers and by the CNV.

The token itself will not transfer title to the property, it is merely a representation of value and, insofar as real estate is concerned, it represents the right to acquire a piece of real property, or income therefrom, within the scope of a trust agreement. In sum, nowadays in Argentina, tokens represent an interest in a trust.

On the whole, through a website or a fintech entrepreneur app, users interested in investing money or crypto assets to acquire real property through financing, or income, may acquire tokens offered by real estate developers on such websites. Depending on the number of tokens acquired through different rounds or project stages, users acquire a given percentage or portion of the property at the same time, until they have obtained all such tokens as are necessary in order to become entitled to execution of the relevant notarial deed of conveyance in connection with the property, in case such user intends to be the owner; or they may become entitled to collect income from such property, after a given period of time, which may be concurrent with the end of the construction works or not.

At present, both the fintech issuing the tokens, and the developer/constructor, and trustee, could be the same company; or they may be companies pertaining to the same business group; or the fintech issuer may form an association with construction companies and/or real estate trusts. As this scheme is not regulated, there may be multiple options.

Thus, by adhesion to the trust agreement, upon purchasing a given number of tokenized square meters through a website, the investor will become a trustor/beneficiary under the trust and, as a beneficiary, subject to the time terms established under such agreement, the investor may be entitled to receive either a unit or income.

As a conclusion, despite the fact that the Argentinian Congress and the CNV have a lot to do in this regard so as to throw some light and legal certainty in connection with these projects, until then, the traditional trust scheme will provide a certain legal framework to assets tokenization, in general, and to real estate tokenization, in particular, so as to continue with their development.

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