

# International **Comparative** Legal Guides



Practical cross-border insights into lending and secured finance

## Lending & Secured Finance **2023**

**11<sup>th</sup> Edition**

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# Panama

Morgan & Morgan



Kharla Aizpurúa Olmos

## 1 Overview

### 1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

The main trends or significant developments in the Republic of Panama (“Panama”) in the lending market revolve around: (a) financing through the local capital markets; (b) financing of public infrastructure projects or private projects related to natural resources; and (c) refinancing and restructuring of existing project and/or corporate debt.

Some developments in recent years have helped further these trends, the most relevant being: (i) continued development of the local capital market through legislation and regulations implemented by the local regulator (i.e., the Superintendency of Capital Markets), including those aimed towards achieving increased efficiency during the COVID-19 pandemic; (ii) active involvement of both the Superintendency of Banks of Panama, as the local banking regulator, and the main association of local banks, in developing legislation to assist debtors during the COVID-19 pandemic and thereafter; (iii) the first Government Contracts to be implemented through the process created by the public-private partnerships legislation (Law 93 of September 19, 2019, regulated through Executive Decree 840, dated December 31, 2020), which are expected to be subject to public bidding carried out in 2023; (iv) issuance of new payment instruments by the Central Government of Panama to help finance the contractors of turnkey projects, named “*Informes de Progreso de Trabajo*” in addition to the already existing “*Certificados de No Objeción*” and “*Cuentas de Pago Parcial*”; and (v) legislation attempts to regulate fintech and crypto assets – Bill 697 of 2022 – “*that regulates the marketing and use of virtual assets, the providers of virtual asset services, and dictates other provisions*” (hereinafter, “Bill 697-2022”). Note that the original bill was approved by the National Assembly and later partially vetoed by the President of Panama and returned to the National Assembly to be debated and adjusted according to the President’s veto. On October 28, 2022, the National Assembly approved an updated version of the Bill 697-2022 after adjusting those articles that were vetoed. On January 26, 2023, the President presented an objection of unconstitutionality to the Supreme Court of Justice and the court must now rule on the constitutionality of the approved version of Bill 697-2022. Thus, the Supreme Court’s ruling will determine whether Bill 697-2022 is enacted into law.

### 1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

1. GENERADORA DE GATUN S.A., a Panamanian corporation (“*sociedad anónima*”), in the senior and mezzanine

- financing for the company to develop, design, engineer, procure, construct, commission, test, start-up, finance, own, operate and maintain an approximately 670 megawatt combined cycle natural gas-fired power plant, together with all interconnections and certain associated infrastructure, to be located on Telfers Island, Panama.
2. AVIANCA HOLDINGS, S.A., a Panamanian corporation (“*sociedad anónima*”), and its subsidiaries, in connection with its financial and corporate restructuring process, implemented to emerge from Chapter 11 proceedings in the United States of America, after having filed for bankruptcy protection in U.S. Courts in May 2020. Avianca’s emergence from Chapter 11 involved the offering of Senior Note Indentures which resulted in over US\$1,700,000,000.00, legal currency of the United States of America (“US\$”), in new investments used to reduce debt and obtain liquidity, as well as an overhaul and reorganisation of its corporate structure.
3. Approximately a US\$2,000,000,000.00 financing agreement related to Line 3 of Panama’s City Metro System, one of the largest public infrastructure projects in Panama.
4. COCHEZ Y CÍA., S.A., a Panamanian corporation (“*sociedad anónima*”), registered and issued revolving corporate bonds for an aggregate amount of US\$90,000,000.00, under the abbreviated registration process for recurring registered issuers with the Superintendency of Capital Markets of Panama, in order for the Issuer to publicly offer the bonds in multiple series, including the issue of Series of Green or Sustainable Corporate Bonds. The first series of bonds, for US\$13,000,000.00, was successfully placed through the Latin American Stock Exchange.
5. MERCANTIL HOLDING FINANCIERO INTERNACIONAL, S.A., an affiliate of Grupo Mercantil and the indirect holder of leading enterprises in the banking and insurance business in Panama and other countries, in the registration of corporate bonds for an aggregate amount of US\$100,000,000.00 with the Superintendency of Capital Markets of Panama to publicly offer the bonds in series. The first series of the bonds, for US\$38,500,000.00, was successfully placed through the Latin American Stock Exchange.

## 2 Guarantees

### 2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, a company (either a “*sociedad anónima*” or “*sociedad de responsabilidad limitada*”, which are the most commonly used legal entities in Panama) can guarantee borrowing of one or more other



members of its corporate group to the extent it is authorised by the appropriate administrative body or holders of equity interest and to the extent there are no limitations in the articles of incorporation and bylaws of the company.

Law 32 of February 26, 1927, which regulates “*sociedades anónimas*” establishes in its article 70 that, to the extent not otherwise regulated in the articles of incorporation, the vote or consent of the shareholders will not be required for the transfer of assets in trust or granting collateral through a pledge or mortgage to secure debts of the company. Therefore, it is generally interpreted that consent of the shareholders *is* required to secure debt obligations of third parties, regardless of whether such third parties are affiliates of the company.

Law 4 of January 9, 2009, which regulates “*sociedades de responsabilidad limitada*” establishes in its article 40 that the administrators will require consent of the partners to perform operations different from the company’s ordinary course of business, to sell assets or transfer in trust or grant collateral through a pledge or mortgage or guarantees (“*fianzas*”), to secure third party debt. Therefore, such companies can guarantee third-party obligations (including those of other members of their corporate group) provided that the partners have authorised such a decision.

## 2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

To the extent appropriately approved under the articles of incorporation, bylaws, applicable law and the minutes of shareholders, partners, directors, or administrators, as applicable, and absent any indications or fraud or other illegal behaviour, we do not believe that circumstances regarding the benefit (or lack thereof) to the securing company would raise enforceability or similar concerns.

## 2.3 Is lack of corporate power an issue?

Yes. Lack of corporate power will bring about issues regarding the validity and/or enforceability of the agreements signed and, furthermore, may generate liability for the signatory or parties involved in the transaction on behalf of a company, either if the signatories have not been duly authorised or if the company is otherwise prevented (e.g., under its corporate documents, existing agreements with other parties, etc.) from granting such security.

## 2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Except for express provisions under applicable regulations (e.g., concessions or licences for generating electrical energy), no governmental consents or filings are required except when shareholder or partner (as the case may be) consent may be required, as described in question 2.1 above.

## 2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

It is relevant that the party granting the guarantee is solvent at the time of executing the security agreement to avoid risks related to an insolvency process under a reorganisation or liquidation, which may affect the validity or enforceability of the underlying security agreement.

## 2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No. Nonetheless, there are certain formalities that will need to be followed subject to the type of guarantee agreement and nature of the assets granted as collateral and whether those documents are signed locally or abroad (if possible to sign abroad). For further information, please refer to the response to question 3.2 below.

# 3 Collateral Security

## 3.1 What types of collateral are available to secure lending obligations?

Collateral trusts, pledges over movable assets, mortgage over immovable assets, mortgage over movable assets, collateral assignment, guarantees (“*fianzas*”) and a general pledge of assets located outside of Panama.

## 3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Except in relation to assets located outside of Panama for which our commercial code does establish a general pledge over said assets, there is no general security agreement, and the types of security agreement are in relation to each type of asset.

1. Pledge over movable assets: the pledged assets must be transferred to the pledgee or a duly appointed third-party custodian. The Panamanian Commercial Code establishes under articles 820 through 822 that there must be an agreed process for the disposition and valuation of the pledged assets, and that the pledged can be enforced either judicially or privately. To the extent not otherwise agreed by the parties, the following in summary applies: prior notice to the pledgor of at least 30 calendar days; valuation carried out by two experts (one appointed by each party); and a third appointed by them jointly in case of a difference. Provisions which authorise the appropriation of the pledged assets without complying with these formalities will be null. This is a private agreement and does not require registration or filing with the Panamanian Public Registry *unless* ownership of the pledged assets is subject to registration with the Public Registry (e.g., ownership quotas in a *sociedad de responsabilidad limitada*).
2. Mortgage over immovable assets: the mortgage over immovable asset must be signed in a Public Deed before a local notary public and registered in the Panamanian Public Registry. The Public Deed must either contain the authorisation of the owner for the mortgage to be created over its assets or expressly refer to a previously registered authorisation.
3. Collateral trusts: the trust business in Panama is regulated and supervised by the Superintendency of Banks of Panama. A licence granted by the Superintendency of Banks is required to act as trustee. Trusts can be created via private agreement and hold any type of assets, however, depending on the asset, certain formalities must be completed. For instance, if there are immovable assets transferred as trust assets to the trust, then the transfer instrument must be executed by the parties in a Public Deed before a local notary public and registered in the Panamanian Public Registry.

- 4. Mortgage over movable assets: if the secured amount is over US\$20,000.00, the mortgage over movable assets must be signed before a local public notary and depending on the type of assets registered in the appropriate authority. It is recommended that the mortgage agreement be registered before the Panamanian Public Registry for it to be opposable *vis-à-vis* third parties.
- 5. Guarantees (“fianzas”): these are private documents that do not require filing or registration before the Panamanian Public Registry or other entity.
- 6. Collateral Assignment Agreement: this type of agreement is generally used as part of collateral packages to: (a) assign credit rights from day one; and (b) perform conditional assignments of certain material agreements subject to, for example, the occurrence of an event of default. Article 1232 of the Panamanian Civil Code establishes that transfer of rights or other intangible assets that cannot be otherwise evidenced must be carried out through the delivery of a public deed including the underlying transfer/assignment agreement. Therefore, these types of agreements are executed through public deed or a private instrument which is then transcribed into public deed.
- 7. General Pledge of assets located outside of Panama: a company can pledge assets located outside of Panama and without the need to deliver the pledged assets to the pledgee. This pledge agreement must be signed: (a) in a public deed before a local public notary; or (b) by private document which will need to be transcribed into public deed by a local public notary and registered in the Panamanian Public Registry.  
For all of the above documents, please note that if they are signed locally, signatures must be certified by a local public notary. If they are signed outside of Panama, the signatures must be authenticated either through the use of an apostille pursuant to the 1961 Hague Convention on legalisation of documents or certified by the Panamanian consul at the place of signature. Furthermore, documents executed in a language other than Spanish must be translated, in Panama, into Spanish by a licensed translator. These requirements apply both for registration purposes (when applicable) and if such documents are to be submitted as evidence before Panamanian courts.

**3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?**

Yes, and this can be accomplished via a mortgage over immovable assets, collateral which hold movable or immovable assets in trust and/or a mortgage over movable assets. The type of security agreement varies depending on the asset. For the type and process, please refer to our response in question 3.2 above.

**3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?**

Yes and this can be carried out via: (a) collateral assignment agreement; or (b) a mortgage over movable assets. Whether notification or consent from the debtor of the receivables is required is subject to what the agreements whereby the receivables are generated establish, as well as applicable law. In general terms, either consent or notification is required. Pursuant to article 20 of Law 29 of 2013, the mortgage over movable assets

that relate to credit rights, present or future, does not require registration if the debtor of the credits is notified within 30 days after the creation of the mortgage. Furthermore, if the mortgage is registered with the Panamanian Public Registry, such notice will not be required.

**3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

Yes, through (a) pledge, or (b) collateral trusts. For a description as to each type of security and process please refer to our response to question 3.2 above.

**3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?**

Yes, through (a) pledge, or (b) collateral trusts. The pledge or transfer in trust must be registered in the share registry or quotas registry and the share or quota certificates, as the case may be, must be transferred to the pledgee/third party depository (in the case of a pledge) or the trustee (in case of a collateral trust).

Security can be validly granted under New York or English law governed documents, but it is relevant that Panama law requirements are considered to avoid risks in an enforcement process or exequatur process, especially in cases in which registration of the security agreement is required in Panama.

**3.7 Can security be taken over inventory? Briefly, what is the procedure?**

Yes, through a mortgage over movable assets, provided the items to be mortgaged are part of the ordinary course of business of the mortgagor, are individually identified and there is an agreed mechanism for substitution of the movable assets which when sold or disposed are replaced with new movable assets. For a description as to the security and process, please refer to our response to question 3.2 above.

**3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?**

Yes; please refer to our response to question 2.1 above.

**3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?**

For notarisation and registration requirements as to each type of security, please refer to our response to question 3.2 above. Registration fees vary depending on the type of security registered.

In general, stamp taxes apply at a value of US\$0.10 for every US\$100 or fraction of the face amount of the obligations evidenced in the document.

**3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

It depends on the type of security and assets. In general terms, the most expensive for the purposes of registration costs relates to mortgages over movable or immovable assets, and collateral trust whereby the trust assets are immovable assets. Regarding timing, although the process of filing and registration before the Panamanian Public Registry varies from case to case, it can generally be estimated to take between five to seven business days. Bear in mind that the Panamanian Public Registry can declare there are defects, which can delay the process.

**3.11 Are any regulatory or similar consents required with respect to the creation of security?**

Please refer to our response to question 2.4 above.

**3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?**

No, there are not.

**3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?**

Please refer to our response to question 3.2 above. Furthermore, please note that if executing collateral agreements in a public deed pursuant to a power of attorney, such power of attorney must either be included in the same deed or, if previously registered, expressly referred to in the deed. To the extent a signatory is a foreign entity, the documents containing the power of attorney, certificate of existence, incumbency and good standing will need to be transcribed into public deed as well (prior authentication via apostille or consul) and, if in a language other than Spanish, translated in Panama by a licensed translator.

## 4 Financial Assistance

**4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company that directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?**

This is not applicable.

## 5 Syndicated Lending/Agency/Trustee/Transfers

**5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?**

Yes, under Panama law an agent or trustee can be recognised and would be authorised to enforce the loan and collateral

security obligations accordingly and subject to the agreements under which it is a party.

**5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

This is not applicable.

**5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

The loan and guarantee documentation should include provisions allowing assignment to the lenders and recognitions of said assignees for the purposes of the security documents and the process, if any, to be followed.

## 6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

**6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

- (a) As a general rule, to the extent the proceeds from the loan will be invested in Panama to generate taxable income in Panama, there is a requirement to deduct or withhold tax from interest payable to foreign lenders by the local borrower. Under Panamanian tax law, interest on the loans paid by the borrower to a lender, should be subject to income tax withholding requirements in Panama. In this case, the income tax to be withheld would be the amount that results from multiplying 50% of the interest payment by the applicable ordinary income tax rate. Ordinary income tax rates are as of the date hereof 25% for corporations. Therefore, the withholding tax applicable would be as of the date hereof of 12.5%, subject to any double taxation treaties or other bilateral tax treaties that may exist.
- (b) As a general rule, for the amounts which cover payment of interest as per our response to (a) above to the extent these are used as deductibles by the local guarantor.

**6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There are no tax incentives or other incentives provided preferentially to foreign lenders. The taxes applicable to loans, mortgages or other security related to effectiveness or registration apply regardless of whether the lender is local or foreign. The main taxes are: (i) stamp tax at the rate of US\$0.10 per US\$100.00 or fraction of the face amount of the obligations evidenced in the document; and (ii) regarding withholding tax applicable to foreign lenders, please refer to our response to question 6.1 above.

**6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?**

No, it will not.

**6.4 Will there be any other significant costs that would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

There are notarial fees and registration fees; the latter is subject to the type of security that can be applicable.

**6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for the purposes of this question.**

No, there are not.

**7 Judicial Enforcement**

**7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a “foreign governing law”)? Will courts in your jurisdiction enforce a contract that has a foreign governing law?**

In general terms under the laws of Panama, the choice of a foreign governing law under a contract is a valid and effective choice of law and a Panamanian court would give effect to such choice of law in any action, suit or proceeding arising out of, or otherwise relating to, such document, as long as the specific provision of said foreign governing law sought to be enforced does not violate Panamanian law or public policy.

The Panamanian Judicial Code in Art. 800 establishes that foreign law can be proved/evidenced through a copy of the relevant norms, court decisions, doctrine, or opinions of foreign attorneys; nonetheless, the judge can directly investigate the foreign law through any appropriate means.

The irrevocable submission by a company to the foreign jurisdiction, in the document is, under the laws of Panama, a valid and effective submission to the jurisdiction of such courts and would be irrevocably binding upon the company.

**7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a “foreign judgment”) without re-examination of the merits of the case?**

Upon issuance of a writ of exequatur by the Supreme Court of Panama, the courts of Panama should recognise and enforce a foreign judgment of competent jurisdiction, in respect to any action, suit or proceeding, including enforcing such judgment. The Supreme Court is authorised to issue a writ of exequatur in respect of a final foreign judgment rendered in a foreign jurisdiction if such judgment conforms with the requirements of the laws of Panama for the enforcement of foreign judgments, which require that:

- (a) the courts outside of Panama who rendered the judgment would in similar circumstances recognise a final judgment of the courts of Panama;

- (b) such judgment was issued by a competent court, meaning it has not contravened the exclusive jurisdiction of the Panamanian courts; it being understood that for the purposes of real property located in Panama, the Panamanian courts will have exclusive jurisdiction;
- (c) the party against whom the judgment or award was rendered was personally served in such action within such foreign jurisdiction;
- (d) the cause of action upon which the judgment or award was based does not contravene the principles or fundamental rights of public order of Panama and the obligation in respect of which the judgment or award was rendered is lawful in Panama;
- (e) such judgment has been properly authenticated under the laws of Panama or pursuant to the 1961 Hague Convention on the legalisation of documents; and
- (f) a copy of the final judgment has been translated into Spanish by a licensed translator in Panama.

**7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?**

- (a) In general terms, approximately 10 years taken into account all instances (meaning including courts of first appeals and cassation), and for enforcement of the judgment it could take an additional four or five years to the extent the process is appealed, and
- (b) to enforce a judgment of the courts it would generally take approximately six to 12 months for an exequatur to be issued and an additional six to 12 months to enforce it before the local courts.

**7.4 With respect to enforcing collateral security, are there any significant restrictions that may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?**

Yes, (a) depending on the type of security, there may be a requirement for a judicial enforcement or public or private auctions, and (b) depending on if the collateral assets include for, example, concessions agreement or licences granted by governmental entities in which case regulatory approvals or notification may be required.

**7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?**

There are none.

**7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?**

Yes; Law 12 of 2016 (the “Panama Insolvency Law” or “Law 12 of 2016”) which regulates insolvency proceedings



(reorganisation or liquidation), establishes that in a reorganisation process, there is the financial protection period which runs from the declaration of the start of the reorganisation process until the reorganisation agreement is confirmed. During said financial protection period, lenders cannot enforce lender claims or their security, amongst others.

**7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?**

Yes, upon issuance of a writ of exequatur by the Supreme Court of Panama, the courts of Panama should recognise and enforce a foreign arbitral award of competent jurisdiction, in respect to any action, suit or proceeding, including enforcing such judgment. The Supreme Court is authorised to issue a writ of exequatur in respect of a final foreign arbitral award rendered in a foreign jurisdiction if such judgment conforms with the requirements of the laws of Panama for the enforcement of foreign judgments, which are the same required for a final foreign judgment as detailed in response to question 7.2 above.

## 8 Bankruptcy Proceedings

**8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?**

In general terms it should not affect its rights unless under an insolvency process of reorganisation while under the financial protection period.

**8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?**

There are preferential creditors in accordance with the Civil Code of Panama under Article 1660 (movable assets) and 1661 (immovable assets and real property rights). Regarding movable assets of the debtor, the preferential rights are as follows: a) credits for construction, repair, conservation, or sales price of property in the debtor's possession; b) pledged assets in possession of the creditor; c) assets guaranteed with a bill or securities bond, over the bill or bond and up to the value covered; d) credits for transportation, on the transported items; e) lodging, on the debtor's property at the place of lodging; g) credits for seeds and cultivation, over the resulting harvest; and f) credits for rents and rents for one year, on the movable property of the tenant at the leased property.

Regarding immovable assets/real property rights of the debtor, the preferential rights are as follows: a) credits in favour of the State, over the taxpayer's assets; b) credits in favour of insurers, over the insured assets; c) mortgages registered in the Public Registry, on the encumbered assets; and d) credits preventively recorded in the Public Registry, by virtue of a court order, for attachments, or enforcements of judgments, on the assets listed.

**8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

Law 12 of 2016 is applicable to both companies and individuals as defined below:

- a commercial or merchant company is a private economic organisation in which certain factors are concurrent such as production with the purpose of producing assets or performing services, which is the property of natural persons or legal entities, and is either incorporated in Panama or is a foreign-incorporated entity with branches qualified to operate in Panama; and
- individuals are natural persons who are merchants.

Therefore, natural persons that are not merchants and entities such as private interest foundations (which, by law, cannot engage in commercial activity) will not be subject to Law 12 of 2016. Furthermore, regulated entities such as banks, insurance companies and trust companies are not subject to Law 12 of 2016 as they are subject to special proceedings (including intervention by their respective regulator) under applicable law. Lastly, governmental entities are not subject to Law 12 of 2016.

Under Law 12 of 2016 there are two possible processes that can be requested: (a) reorganisation; or (b) liquidation, whether voluntary or involuntary.

**8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?**

Private (i.e., non-judicial) enforcement can be carried out for pledged assets and those subject to movable mortgages.

## 9 Jurisdiction and Waiver of Immunity

**9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?**

Yes, it is.

**9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?**

Yes, it is.

## 10 Licensing

**10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e., a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?**

There are no licensing or eligibility requirements to lenders, including foreign companies, unless they relate to the banking business locally in which case a banking licence may apply.

Engaging in the banking business in Panama, including, but not limited to, the solicitation and receipt of deposits in or from Panama, required a banking licence issued by the

Superintendency of Banks of Panama (hereinafter, the “SBP”). Decree Law 9 of February 26, 1998, as amended (hereinafter, the “Banking Law”) defined banking business as “*principally, the receipt of resources from the public or from financial institutions by means of the acceptance of time deposits or by any other means determined by the Superintendency or by banking practices, and the use of such resources for the bank’s benefit and at its own risk, to grant loans, make investments or for any other transaction authorized by the Superintendency*”.

Under Panama law, the Ministry of Commerce and Finance (“MICI”) is the entity that regulates financial entities that are not banks. Under Law 42 of July 23, 2001, as amended, and its regulation Executive Decree 213 of October 26, 2010, a financial company (“Financial Company”) is “the natural or legal persons that will be committed to offering to the general public loans or finance facilities in cash”. Financial Companies are required to request for a licence from the Directorate of Financial Companies of MICI and there are specific requirements they will need to comply with to obtain said authorisation. Furthermore, the Financial Companies have recurring obligations before MICI including but not limited to certain provisions that need to be included in the financing agreements.

There are no licensing or eligibility requirements for an agent under a syndicated facility for lenders.

11 LIBOR Replacement

11.1 Please provide a short summary of any regulatory rules and market practice in your jurisdiction with respect to transitioning loans from LIBOR pricing.

The general practice for purposes of banks has been amending the agreements to the extent necessary to include a replacement rate (e.g., SOFR) and include provisions in new agreements to contemplate this situation or even future changes.

12 Other Matters

12.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2022 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2021/2022 due to COVID-19 to continue into 2023 and beyond?

The impact of the COVID-19 pandemic led to the lessening of formalities and forced both the private and public sectors to use technology in assisting them in the processes and formalisation of documents. Please note that, in some cases, this meant making use of existing regulations such as Law 51 of July 22, 2008, as amended, which defines and regulates electronic documents, electronic signatures, storage of electronic documents and e-commerce, amongst others, and allows and recognises electronic signatures and electronic documents as valid and original to the extent they comply with the requirements therein. We do want to mention that, locally, the use of electronic signatures in court proceedings is still under development.

12.2 Are there any other material considerations that should be taken into account by lenders when participating in financings in your jurisdiction?

The U.S. Dollar is legal tender in Panama. Additionally, Panama is a country open to foreign investment and as such has implemented legislation to assist, attract, provide stability and incentives for such investments.



**Kharla Aizpurúa Olmos** is a Partner in the Corporate Law Department of the firm and co-head of the banking and finance team. Ms. Aizpurúa concentrates her practice on syndicated lending, project finance, governmental infrastructure projects (including transportation and energy), securitisation, public offerings, mergers and acquisitions, services related to the telecommunications sector, startups and e-commerce, compliance and data protection. Ms. Aizpurúa Olmos has been recognised for her professional achievements (Up and Coming) in the first edition of the Latin American Energy and Infrastructure Awards organised by the Iberian Legal Group. In addition, she has been distinguished by *Chambers & Partners* and *The Legal 500* for her work in banking and finance, and commitment in diversity and inclusion. Moreover, she is also recognised as a Women Leader in Panama by *IFLR1000 Women Leaders*, an elite ranking of the most prominent lawyers worldwide.

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Our practice focuses on banking law including project finance, drafting loan (and debt issues), security documentation associated with complex financing transactions, setting up leasing and factoring facilities, to the handling of all legal aspects related to banking acquisitions and mergers (including tender offers for publicly traded banks), commercial loans, real estate loans, restructuring and refinancing of debt and ongoing regulatory assistance related to banking operations.

In 2022, "Project Gatún" won the "Loan of the Year" in Latin America's energy sector at the Latin Finance Awards 2022. Our firm acted as Panamanian counsel to our clients Generadora de Gatún, S.A., and AES Panama in connection with this financing. In addition, "Panama Metro Line 3" won the "Infrastructure Financing of the Year" in Latin and Central America at the Latin Finance Awards 2022. Our firm acted as Panamanian counsel to our client Banistmo, S.A. in connection with this transaction.

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