

PANAMA



Law and Practice

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Contents

1. Loan Market Overview p.5

- 1.1 The Regulatory Environment and Economic Background p.5
- 1.2 Impact of Global Conflicts p.5
- 1.3 The High-Yield Market p.5
- 1.4 Alternative Credit Providers p.5
- 1.5 Banking and Finance Techniques p.5
- 1.6 ESG/Sustainability-Linked Lending p.5

2. Authorisation p.5

- 2.1 Providing Financing to a Company p.5

3. Structuring and Documentation p.5

- 3.1 Restrictions on Foreign Lenders Providing Loans p.5
- 3.2 Restrictions on Foreign Lenders Receiving Security p.6
- 3.3 Restrictions and Controls on Foreign Currency Exchange p.6
- 3.4 Restrictions on the Borrower's Use of Proceeds p.6
- 3.5 Agent and Trust Concepts p.6
- 3.6 Loan Transfer Mechanisms p.6
- 3.7 Debt Buyback p.6
- 3.8 Public Acquisition Finance p.6
- 3.9 Recent Legal and Commercial Developments p.6
- 3.10 Usury Laws p.6
- 3.11 Disclosure Requirements p.6

4. Tax p.7

- 4.1 Withholding Tax p.7
- 4.2 Other Taxes, Duties, Charges or Tax Considerations p.7
- 4.3 Foreign Lenders or Non-money Centre Bank Lenders p.7

5. Guaranties and Security p.7

- 5.1 Assets and Forms of Security p.7
- 5.2 Floating Charges and/or Similar Security Interests p.12
- 5.3 Downstream, Upstream and Cross-Stream Guaranties p.12
- 5.4 Restrictions on the Target p.12
- 5.5 Other Restrictions p.12
- 5.6 Release of Typical Forms of Security p.12
- 5.7 Rules Governing the Priority of Competing Security Interests p.13
- 5.8 Priming Liens p.13

6. Enforcement p.13

- 6.1 Enforcement of Collateral by Secured Lenders p.13
- 6.2 Foreign Law and Jurisdiction p.14
- 6.3 Foreign Court Judgments p.14
- 6.4 A Foreign Lender's Ability to Enforce Its Rights p.14

7. Bankruptcy and Insolvency p.14

- 7.1 Impact of Insolvency Processes p.14
- 7.2 Waterfall of Payments p.15
- 7.3 Length of Insolvency Process and Recoveries p.16
- 7.4 Rescue or Reorganisation Procedures Other Than Insolvency p.16
- 7.5 Risk Areas for Lenders p.16

8. Project Finance p.17

- 8.1 Recent Project Finance Activity p.17
- 8.2 Public-Private Partnership Transactions p.17
- 8.3 Governing Law p.17
- 8.4 Foreign Ownership p.18
- 8.5 Structuring Deals p.18
- 8.6 Common Financing Sources and Typical Structures p.18
- 8.7 Natural Resources p.19
- 8.8 Environmental, Health and Safety Laws p.19

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Morgan & Morgan is one of the largest and most recognised full-service law firms in Panama, with roots dating back to 1923. The firm has extensive experience assisting both local and multinational corporations from various industries, including recognised financial institutions and government agencies. Additionally, the firm also caters to the legal needs of individual clients. The firm's banking and finance team is comprised of two leading partners, four supporting partners and three associates. The practice has broad expertise and has participated in numer-

ous financing transactions, acting on behalf of both creditors and debtors. It focuses mainly on drafting loan and security documentation associated with complex financing transactions, setting up leasing and/or factoring facilities, both as lender or borrower counsel, and managing all legal aspects related to banking acquisitions and mergers. On banking operations, the team has assisted many banks and financial institutions in the process of obtaining licenses, as well as ongoing regulatory assistance related to their operations in the country.

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1. Loan Market Overview

1.1 The Regulatory Environment and Economic Background

The loan market's direction and trends have been primarily influenced by the pursuit of new financing options through foreign or local investment. This involves developing new financial products for the local market, often incorporating technology. Additionally, the need for refinancing and debt restructuring in certain sectors, due to the strain caused by the COVID-19 pandemic, has played a significant role.

1.2 Impact of Global Conflicts

The primary impact has been an increase in interest rates, which, locally, is a direct result of the global situation.

1.3 The High-Yield Market

To date, the high-yield market does not play a significant role in emerging trends, as it is not a common source of financing in Panama.

1.4 Alternative Credit Providers

There has not been a significant growth in alternative credit providers.

1.5 Banking and Finance Techniques

In general, banking and finance techniques continue to evolve to reflect the investor base and needs of borrowers through different Holdco structures to assist risk management and reporting concerns from the side of the borrowers and with strong collateral packages on the investor side that secure a flow of funds and revenues.

1.6 ESG/Sustainability-Linked Lending

ESG and sustainability financing remain a top priority and concern in the finance sector. Market trends show increased issuance of green bonds and financing agreements with stricter ESG

clauses, applicable not only to foreign investment but also to local investment requirements, regardless of the project type.

2. Authorisation

2.1 Providing Financing to a Company

Both banks and non-banks are generally authorised to finance companies incorporated under the laws of Panama. Local financial institutions that engage in "banking business" and accept public deposits must hold a general banking license issued by the Superintendence of Banks of Panama. Foreign banks are allowed to grant financing to companies organised under the laws of Panama.

For non-banks, depending on the type of financing, there may be requirements and/or authorisation needed from the Superintendence of Securities Market of Panama.

Lastly, there is the Ministry of Commerce, which acts as the regulator of local financial companies that grant personal loans.

It is worth mentioning that there can be different tax implications for non-banks granting local credits.

3. Structuring and Documentation

3.1 Restrictions on Foreign Lenders Providing Loans

There are no restrictions on foreign lenders providing loans.

3.2 Restrictions on Foreign Lenders Receiving Security

Foreign lenders face no restrictions in receiving securities or guarantees. However, in the case of trust agreements, they will require a trustee that holds a trust license issued by the Superintendency of Banks of Panama.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls regarding foreign currency exchange.

3.4 Restrictions on the Borrower's Use of Proceeds

There are no restrictions on a borrower's use of proceeds from loans or debt securities other than those imposed by the terms and conditions agreed among the parties in each financing, which would include, in general terms, restrictions such as payment of dividends.

3.5 Agent and Trust Concepts

Agent and trust concepts are recognised in Panama.

Agency structures, primarily regulated contractually, are commonly used through administrative agent or paying agent roles. Trusts, on the other hand, are regulated locally by the Superintendency of Banks. Trustees have to hold a license issued by the Superintendency of Banks in order to act as such in any type of administrative or guarantee trust.

3.6 Loan Transfer Mechanisms

Loan transfer mechanisms, including the transfer of associated security packages, exist in Panama. These mechanisms are generally embedded in the financing agreement and security package documentation, allowing lenders to freely transfer their position subject to an agreed-upon

process and the execution of assignment agreements. While this has been the general practice, borrowers with leverage are increasingly negotiating assignment clauses to require their consent or provide them with the option to veto or choose the assignee.

3.7 Debt Buyback

There are no restrictions on debt buyback, with the understanding that any debt repurchased by the borrower is cancelled.

3.8 Public Acquisition Finance

Currently, there are no specific regulations governing public acquisition finance transactions.

3.9 Recent Legal and Commercial Developments

Recent legal and commercial developments necessitating changes to our legal documents primarily relate to AML covenants, representation and guarantees, ESG provisions, and data protection requirements. Additionally, despite the insolvency law being enacted in 2016, insolvency provisions have gained renewed focus due to recent case law. These particular clauses are typically subject to detailed scrutiny by the parties involved.

3.10 Usury Laws

As of now, there are no usury laws applicable to commercial contracts. However, since the COVID-19 pandemic, there have been attempts to introduce legislation in the National Assembly to regulate this area, though none of these bills have been passed.

3.11 Disclosure Requirements

There are no rules or laws on disclosure of certain financial contracts.

4. Tax

4.1 Withholding Tax

Payments of principal, interest or other payments made to lenders are not generally subject to withholding taxes (and thus considered regular income of the lender), except in certain cases.

Specifically, interest and commissions paid to foreign lenders (ie, lenders domiciled outside of Panama) will be subject to an amount that results from multiplying 50% of the interest payment by the applicable ordinary income tax rate. The ordinary corporate income tax rate in Panama is 25%. Therefore, the withholding tax applicable would be 12.5%. The above withholding tax is not applicable when: (i) the proceeds of the loan are not used or invested in Panama, and (ii) the proceeds do not generate “Panama Source Income”.

Article 694 of the Panamanian Tax Code defines “Panama Source Income” as income generated by activities carried out within the Republic of Panama.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Except for certain documents (like negotiable instruments and/or documents requiring registration in the Public Registry of Panama), all documents related to activities under Panamanian jurisdiction are subject to a stamp tax of USD0.10 per USD100.00 of face value. Therefore, loans used for activities within Panama and generating Panama Source Income are subject to stamp taxes. These taxes are due within the first 15 calendar days of the month following the document’s execution.

Documents subject to foreign jurisdiction but used as evidence or for enforcement in Pana-

manian courts or administrative authorities are also subject to stamp tax.

Additional relevant duties include registration fees charged by the Public Registry of Panama, applicable to certain security documents like real estate mortgages or guarantee trust agreements involving immovable assets.

4.3 Foreign Lenders or Non-money Centre Bank Lenders

See 4.1 Withholding Tax and 4.2 Other Taxes, Duties, Charges or Tax Considerations regarding withholding taxes, stamp taxes and registration fees.

5. Guaranties and Security

5.1 Assets and Forms of Security

The most common assets available as collateral in Panama are real property, shares or quotas, cash flow, and certain chattel property, depending on the purpose of the loan. The most frequently utilised securities over such collateral are (i) trusts; (ii) pledges; (iii) collateral assignment agreements; (iv) real estate mortgages; and/or (v) chattel mortgages.

Trusts

The trust agreement typically serves as the “umbrella” in favour of which all security interests are created, due to the additional protections provided to trusts pursuant to Law 1 of 1985, as amended by Law 21 of 2017 (hereinafter, the “Trust Law”), and Law 21 of 2017 (hereinafter, the “Trustee Business Law” and together with the Trust Law, the “Trust Laws”).

There are two main types of trusts used in Panama for purposes of collateral:

- **Guarantee trust agreement:** Its primary intention is to ensure the fulfilment of the “secured obligations” as defined in the respective trust agreement. This trust typically includes mortgage rights or pledge rights as trust assets, amongst others.
- **Administration and guarantee trust agreement:** In addition to ensuring fulfilment of the secured obligations, this has an additional purpose of administration of assets. Prior to a default that leads to the enforcement of the security interests, the trustee preserves, safeguards, and manages the trust’s assets. Trust assets are usually shares or participation quotas, trust accounts (with their respective flows, which are assigned to the trust), real estate, among others.
- **Trust agreement with real estate as trust assets:** This must be established via a public deed and registered in the Public Registry for the transfer of the real estate to be transferred to the trustee. Therefore, the transfer of real estate to a trust will be enforceable against third parties from the date of registration in the Public Registry of the transfer in favour of the respective trust.

In accordance with the Trust Laws, the trust agreement, in general, must comply with the following formalities for its establishment and validation:

- **Trust agreement with only movable property as trust assets:** This can be established via a private document signed between the parties. The signatures of the settlor(s) and the trustee must be authenticated by: (i) if signed locally, a local public notary; or (ii) if signed outside Panama, apostilled or certified by the Panamanian consul of the place of signature, for purposes of enforceability against third parties. Additionally, it should be noted that depending on the type of “movable property” transferred to the trust, compliance with certain registration requirements may be required (for example, if vehicles are part of the trust’s assets, the change in owner must be documented in the municipality in which the vehicle is registered or there may be a requirement that the transfer document be made through a public deed).

Shares (of a “*sociedad anónima*”) or quotas (of a “*sociedad de responsabilidad limitada*”) can also be transferred in favour of trusts, whether or not they are registered in the Public Registry (see the two bullet points above), as trusts that only hold shares or quotas are not required to be registered (nonetheless, the transfer or assignment of quotas does require said *Sociedad de responsabilidad limitada* to register the change in partner in the Panamanian Public Registry as detailed below). In this scenario, the trustee would become the shareholder/partner of the relevant company.

The settlors, who were shareholders before contributing the shares/quotas to the trust (hereinafter, the “Shareholder Settlers”), are usually allowed to maintain their political and/or economic rights until a default occurs under the financing documents. In certain cases, economic rights may also be restricted, for example, because dividends are also assigned as a trust asset to the respective trust.

The trustee, as the new shareholder/partner of the company, can issue a revocable power of attorney in favour of the Shareholder Settlers with the agreed political rights over which they may vote until such power is revoked, which usually occurs when there has been a default under the financing documents. The trust agreement will contemplate the obligations of the trust-

tee prior to a default of the financing documents and after such default, including the foreclosure process.

The share/quota registry book is often kept in custody of the trustee, to facilitate the annotation of any changes of shareholder/quota holder, in case of foreclosure.

The formalities for the transfer of shares or quotas include: (i) endorsement of the respective certificates in the name of the trustee; and (ii) annotation in the share/quota registry book. For purposes of quotas, the assignment will need to be protocolised in a public deed and registered in the Public Registry in accordance with Article 26 of Law 4 of 2009. Additionally, if there are other partners, they must waive their preemptive rights.

It is customary to request a certification from an authorised representative of the company whose shares or quotas are transferred, which certifies that the transfer was annotated in the corresponding share/quota registry.

The private trust agreement is subject to stamp tax at a rate of USD0.10 for each USD100 of the value of the document. Trusts established under public deeds which involve real estate assets as part of the trust assets pay a registration fee equal to USD3.00 for each USD1,000.00 of the secured obligations, plus a stamp tax of USD8.00 per page.

Pledges

The pledge agreement is regulated by Article 814 and subsequent articles of the Panamanian Commercial Code, which establish that (i) the pledge agreement must be established under the same formalities as the agreement it serves to guarantee; (ii) there must be “delivery” of the

pledged asset to the creditor or to a depository chosen by the creditor and the debtor (ie, for purposes of a pledge over shares or quotas, the share/quota certificate must be actually delivered to the creditor or depository, to be held in custody); and (iii) the agreement must be in writing.

Foreclosure of pledges can be (i) judicial or (ii) extrajudicial. In the latter case, the procedure to follow will be established in the pledge agreement, while in the former, it will be necessary to resort to the courts, which may take longer than the extrajudicial process. A judicial pledge enforcement process before the courts can last between one and three years or even longer depending on the acts of the foreclosed party.

The extrajudicial process must comply with Articles 820 to 822 of the Panamanian Commercial Code, which establish, among other things, that the method to be used to determine the value of the pledged assets must be agreed upon to ensure their fair market value. In the absence of an agreement, the rules of the Panamanian Commercial Code would apply, which require the pledged asset to be appraised by two experts appointed one by each party or by a third party appointed by them in case of disagreement, or by the judicial authority in the absence of experts.

The pledge agreement is valid between the executing parties from its date of execution, but it is advisable and customary to authenticate the signatures before a public notary. Additionally, for purposes of a pledge over shares/quotas:

- A blank endorsement of the share/quota certificates in the name of the trustee is commonly delivered, although it is not a requirement for the validity of the pledge. The blank

endorsement is a risk mitigation tool that would assist the judicial or extrajudicial foreclosure process.

- An annotation in the share/quote registry book is made, to reflect the pledge.
- Similar to the transfer of shares/quotas in favour of the trustee, it is customary to request a certification from an authorised representative of the company whose shares/quotas are pledged, certifying that the pledge was annotated in the corresponding registry book.

In the case of *sociedad de responsabilidad limitada*, the pledge of quotas is viable if the articles of incorporation do not provide otherwise. The pledge can be established through either a private document or a public deed, with the option to register it in the Public Registry at the discretion of the company's partners. From the lenders' perspective, the usual practice is to request that it be recorded in a public deed and registered in the Public Registry. This ensures that the partners are aware of the pledge and will recognise the adjudicated party in the event of a foreclosure.

The pledge agreement is subject to stamp tax at a rate of USD0.10 for each USD100 of the value of the document.

Assignment Agreement

Under the assignment agreement, specific rights (usually, accounts payable or rights to be paid under certain contracts) can be unconditionally assigned, and specific agreements (lease agreements, power purchase agreements and other agreements that provide cash flow to the borrower) are conditionally assigned either to the lender(s), administrative agent or the trustee (in the latter case, depending on whether the security package includes a trust).

The Civil Code and the Commercial Code regulate the way notifications or consents necessary for the perfection of such assignments agreed between assignor and assignee must be made or obtained, and which rights are assignable, and how to perfect the assignment, depending on the right being assigned.

As mentioned above, usually, the assignment agreements that are part of the collateral documents of a financing arrangement contemplate (i) an unconditional assignment of economic flows; and (ii) a conditional assignment of certain material contracts, which would be effective upon the occurrence of a default under the financing documents.

To perfect the assignment of rights and/or contracts, there are certain formalities:

- Unconditional assignment of rights (cash flows): For these assignments to be effective against the assignor's counterparty (ie, the payor of the payable being assigned) so that the assignee (trustee) can directly collect them from said third party, the assignor must either notify the third party or obtain its consent, depending on the underlying contractual obligations with such third party. Notifications must comply with Article 789 of the Commercial Code, which states that the notification must be made "in the presence of two witnesses, or in another authentic form." The payor who refuses to recognise the assignee as creditor and wants to oppose the assignment, must object within twenty-four hours of being notified, after such time the assignment will be considered accepted for all legal purposes.
- Conditional assignment of material contracts: In order for the assignment of the material contracts to be perfected, the fulfilment

of certain conditions is required, which are agreed upon as of the date of signing the respective assignment contract. The conditions of a conditional assignment may vary according to what the parties stipulate in the assignment agreement, but typically include: (i) notification of default under the financing documents; (ii) prior consent or notification from the respective counterparty; and (iii) designation of the assignee or indication of the capacity of the assignee to designate a new entity in favour of which the contract will be assigned in case of default. The purpose of the conditional assignment is to ensure, prior to a default, that the counterparties of the material contracts are aware of the financing documents and accept that, in the event of a default, they must proceed according to the instructions of the assignee and whoever they designate.

The assignment agreement is subject to stamp tax at a rate of USD0.10 for each USD100 of the value of the document.

Real Estate Mortgage

Real estate properties include all existing and future assets of the debtor that constitute real estate in accordance with Article 325 of the Panamanian Civil Code, and all improvements and fixtures thereof. The mortgage and antichresis over real estate is regulated by the Civil Code, and its execution is only before the courts. Real estate mortgages must be signed in a public deed before a public notary and registered in the Public Registry of Panama.

Real estate mortgages pay a registration fee equal to USD10.00 per property, plus USD3.00 for each USD1,000.00 of the secured amount of the mortgage, plus a stamp tax of USD8.00 per page.

Chattel Mortgage

The purpose of this guarantee is to cover movable goods that would not be covered by other guarantees established under the respective financing documents; for example, solar panels in the case of a solar energy project, intellectual property, cars, amongst others.

Article 326 of the Civil Code states that “movable goods are those that can be appropriated and are not included in the previous chapter, and in general all those that can be transported without damage to the immovable property to which they were attached.”

Law 129 of 2013, which regulates chattel mortgages or mortgages over movable goods (“Law 129”), establishes that such mortgage with a lien amount equal to or greater than USD20,000 must be granted in a public deed for their perfection. In those cases where the value is less than USD20,000, the contract may be made in a private document. Additionally, depending on the type of movable property, registration in a relevant registry may be required and could be optional before the Public Registry of Panama.

One of the main advantages of Law 129 is that it allows foreclosure to be either judicial or extrajudicial. However, in the case of extrajudicial foreclosure, the procedure established in Law 129 to initiate the extrajudicial foreclosure process requires that a foreclosure form be presented to the Public Registry, the purpose of which is to notify third parties of the commencement of the foreclosure. However, to date, the Public Registry has not issued the form to be presented in these cases, which could cause delays in the foreclosure.

Chattel mortgages subject to registration in the Public Registry pay a registration fee equal to

USD10.00 per property, plus USD3.00 for each USD1,000.00 of the secured amount of the mortgage. Chattel mortgages also pay a stamp tax of USD8.00 per page, if they are in a public deed, regardless of whether registered or not. In the case of private chattel mortgaged, the applicable stamp tax would be payable at a rate of USD0.10 for each USD100 of the value of the document.

5.2 Floating Charges and/or Similar Security Interests

Although Panamanian law does not permit universal charges over local assets (except for a pledge over all assets located outside of Panama regulated by the Commercial Code which has its complexities for enforcement), pledges could be a mechanism but it is Law 129 that provides for the creation of chattel mortgages over inventory (although they are not common). Law 129 defines “inventory” as “goods or chattels available for sale within the ordinary course of the guarantor’s business that may be mortgaged, provided that the contract establishes the mechanisms for substituting the good or goods that are part of the inventory and are alienated by new chattels that enter said inventory”.

Furthermore, Law 129 establishes that in the case of a chattel mortgage over inventories or any other changing assets, the initial inventory will be generally determined, and the mortgage shall indicate the way the inventory or changing assets may be conveyed and substituted. The chattel mortgage over inventory or changing assets, its establishment, registration, replacement of mortgaged goods, and enforcement will be regulated by what the parties establish in the respective contract and, in the absence of an agreement, by the provisions of Law 129.

5.3 Downstream, Upstream and Cross-Stream Guaranties

It is possible for entities in Panama to give downstream, upstream and cross-stream guarantees, and there are no general limitations or restrictions for doing so to the extent the necessary corporate authorisations are obtained and no limitation or restrictions exist in the corporate documents.

5.4 Restrictions on the Target

A target being acquired is not restricted from granting guarantees or security or financial assistance for the acquisition of its own shares.

5.5 Other Restrictions

There are no other restrictions or significant costs associated with, or consents required to approve the grant of security or guarantees, other than the necessary corporate authorisations.

5.6 Release of Typical Forms of Security

The process of releasing security interests varies depending on the specific type of document used to establish the security in the first place. Usually, parties to a trust, a pledge and an assignment agreement execute a termination agreement, agreeing to terminate the respective documents. Trust termination agreements usually include a clause releasing the trustee from any claims related to its handling of the trust property. If the trust is registered in the Public Registry, the termination is also registered. In a pledge termination, the pledged shares are returned to the shareholder that pledged them, and the corresponding annotations are made in the share/quota registry book. In assignment agreement terminations, third-party payors are notified of the termination, so that payments to the assignee cease.

On the other hand, mortgages (either real estate or chattel) are terminated by the registration, in the Public Registry, of a termination or release deed.

5.7 Rules Governing the Priority of Competing Security Interests

With respect to security established over the same assets, priority will be granted to the one that was established or created first, unless the secured party under the first guarantee expressly agrees to be subordinated (via a subordination agreement or express consent) to a new security. Also, Panamanian law allows for there to be more than one security interest over the same collateral, provided all parties agree. For example, there can be a first and second mortgage over chattel or real property.

With respect to pledges, particularly share/quota pledges, and a first and second lien, given that one of the fundamental requirements of a pledge is for the creditor or a depositary to hold the pledges shares/quotas in custody, a second pledge cannot be established, as the certificate cannot be physically held by two pledgees at once. Nevertheless, in such situations, parties often establish a promise to pledge, which states that, once the first lien is released, the second pledgee will receive the pledges shares/quotas automatically.

In general terms, contractual subordination provisions survive the insolvency of a borrower incorporated in Panama, except in cases of fraud by the insolvent party.

5.8 Priming Liens

The most material security interests that arise by operation of law that can prime a lender's security interest pertain to immovable assets. The Civil Code recognises a preferential right for the

payment of taxes related to the asset and certain insurance premiums.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Usually, a secured lender can enforce its collateral under an event of default as outlined in the credit agreement or applicable collateral documentation regarding a specific transaction. Under Panamanian law, the enforcement of collateral by a secured lender can vary depending on the type of collateral involved (eg, real estate, movable assets, financial instruments) and the agreed terms between the parties. The lender may have the option to enforce the collateral either judicially or extrajudicially.

Regarding a judicial enforcement, it involves the lender initiating legal proceedings in court to enforce their security interest. To this extent, the lender may opt to file for the seizure of the debtor's assets to ensure the payment of the owed funds prior to the final judgment. Please note that if the collateral involves an enforceable title (" *título ejecutivo* " in Spanish) as determined by the Panamanian Judicial Code, lenders can opt for an expedited procedure to enforce their rights.

Under the Panamanian Judicial Code, an enforceable title might include public deeds, promissory notes or private documents (eg, a joint and several guarantee) of any kind provided that the debtor has acknowledged their signature before a judge, has been deemed to have confessed, has presented the document to a notary for certification or protocolisation, or has passed away and their heirs have confirmed the authenticity of the signature.

When applicable and agreed upon, extrajudicial enforcement (generally in pledges or trusts) allows lenders to bypass court procedures, enabling quicker recovery of their assets. It is a cost-effective and flexible method for enforcing security interests.

6.2 Foreign Law and Jurisdiction

The choice of foreign law to govern a contract is recognised under Panamanian law. Furthermore, the agreement of a Panamanian party to submit to a foreign jurisdiction is both lawful and enforceable and does not invalidate the jurisdiction clause.

6.3 Foreign Court Judgments

Subject to the issuance of a writ of exequatur by the Supreme Court of Panama, any final judgment rendered by a foreign court or an arbitral tribunal would be recognised, conclusive and enforceable in the courts of the Republic of Panama without reconsideration of the merits, provided that:

- such foreign court grants reciprocity to the enforcement of judgments of courts of the Republic of Panama;
- the party against whom the judgment was rendered was personally (not by mail) served in such action within such jurisdiction;
- the judgment arises out of a personal action against the defendant;
- the obligation in respect of which the judgment was rendered is lawful in the Republic of Panama and does not contradict the public policy of the Republic of Panama;
- the judgment is properly authenticated by diplomatic or consular officers of the Republic of Panama or pursuant to the 1961 Hague Convention on the legalisation of documents;

- the judgment of a foreign court or arbitral tribunal does not violate the public policy of Panama; and
- a copy of the final judgment is translated into Spanish by a licensed translator in Panama.

6.4 A Foreign Lender's Ability to Enforce Its Rights

In general, there are no specific issues affecting a foreign lender's ability to enforce rights under a loan or security agreement. However, each contract must be individually examined to determine enforceability, especially when governmental entities are involved.

7. Bankruptcy and Insolvency

7.1 Impact of Insolvency Processes

Generally, lenders have statutory rights to enforce their liens outside a restructuring or insolvency context, which, generally, consists of filing an executory proceeding (*proceso ejecutivo*) before the corresponding tribunal and undergoing an auction process to recover any amounts from the assets.

However, in a reorganisation insolvency proceeding, under Law 12 of 2016 (the "Insolvency Law"), creditor rights to enforce liens are subject to limitations. For instance, under the Insolvency Law, upon the filing of a reorganisation request by the debtor to the corresponding tribunal, the debtor is generally prohibited from constituting and executing guarantees over its assets, including guarantee trust arrangements. Moreover, once the reorganisation is admitted and officially commences per the tribunal's resolution, a financial protection period starts from said resolution's date until a reorganisation agreement is reached between the creditors and the debtor,

and is approved by the judge overseeing the proceedings.

During this financial protection period, executive proceedings (*procesos ejecutivos*) of any class are prohibited from commencing, as well as any proceedings for restitution of goods or for eviction of the debtor (to this effect, statute of limitation periods are suspended). Also, during the financial protection period, no proceedings to enforce any security or lien over assets of the debtor may be commenced and those that have commenced but have yet to reach the auction stage are suspended. Nonetheless, once the financial protection period has commenced, the reorganisation proceeding's judge may, on the request of a creditor, authorise such security or liens enforcement if the judge finds that this would not affect the operations of the company or the ability of the debtor and creditors to reach a reorganisation agreement. However, if more than six months elapse from the date on which the financial protection period commenced, the rights to enforce real property security/liens over real property, or guarantee trusts, are automatically reinstated without the need for a judicial resolution.

On the other hand, in a liquidation insolvency proceeding, under the Insolvency Law, creditors with in rem security interests (*derechos reales*) over the debtor's assets may continue their actions against assets so encumbered by a mortgage, antichresis or pledge, without affecting the ability of such actions to be carried out in the liquidation insolvency proceeding.

7.2 Waterfall of Payments

According to Panama's Civil Code, priority among classes of secured creditors is determined in accordance with the assets securing their credit.

According to Article 1660, the following order of preference applies to credits related to specific movable assets of the debtor:

- credits regarding the construction, reparation, conservation or sale price of moveable goods or assets that are in possession of the debtor, up to the value of said moveable goods;
- those guaranteed by a pledge that are in the creditor's power, over the thing pledged and up to its value;
- credits secured by a guarantee (*fianza*) with respect to effects or securities, and granted in a public or commercial establishment;
- credits relating to transportation, regarding transported goods, up to the time of delivery and up to 30 days afterwards;
- credits relating to lodging, regarding movables goods of the debtor at the place of lodging;
- credits relating to seeds and expenses related to crops; and
- credits relating to leases of one year, regarding movables of the debtor on the leased property and the proceeds from such leased property.

According to Article 1661, the following order of preference applies to credits related to real property rights:

- credits in favour of the state for the amounts of taxes owed in relation said real property;
- credits of insurers, over insured assets;
- mortgage and antichresis credits registered at the Public Registry over mortgaged, and subject to antichresis, goods; and
- credits annotated in the Property Registry, on a preventive basis, pursuant to a judicial order, embargoes, attachments or executions of judicial resolutions over the annotated

goods and are preferred only in relation to subsequent credits.

Article 1662 relates to the qualification of credits in connection with other moveable and immovable goods not included in the lists of Articles 1660 and 1661, such as tax credits of municipalities; credits related to judicial expenses; credits related to the debtor's funeral; and credits regarding a debtor's last illness expenses, stipends or salaries of a debtor's dependants, alimony, etc.

Finally, Article 1663 provides that credits of any other class (other than those listed in Articles 1660 through 1662) shall not enjoy any preferred rights.

Thereafter, Articles 1664 through 1667 concern the order of priority of credits. Article 1664 related to priority of payment in terms of preferred credits in connection to certain moveable assets, and establishes that (i) credits secured by pledge exclude other credits up to the value of the pledged asset; (ii) in the case of sureties, if a surety is granted to more than one creditor, preference shall be determined by the date of constitution of such guarantee; (iii) credits relating to seeds and expenses related to crops shall have priority over credits relating to leases; and (iv) in all other cases, the value of the goods shall be distributed proportionally among the creditors that have priority.

Lastly, in general terms, creditors secured by immovable assets have priority and exclude any other creditors up to the amount of the value of such assets. If, after paying the preferred creditors, any remaining amounts or assets of the borrower are available, they are distributed among the remaining creditors.

7.3 Length of Insolvency Process and Recoveries

The Insolvency Law establishes that the financial protection period shall last no more than six months; however, in practice, these proceedings have taken between one and two years, with the financial protection lasting for the duration of the proceeding. The timing will depend on the complexity of the debts of the insolvent company and the number of creditors that are part of the process.

7.4 Rescue or Reorganisation Procedures Other Than Insolvency

Typically, credit agreements between banks (as the most common creditors) and debtors involve various security arrangements, such as mortgages, pledges, assignment of credit rights and personal bonds. Thus, usually, it may be more convenient (depending on the financed amount, the debtor and other factors) to renegotiate, refinance and/or reach an extrajudicial agreement (which can include settlement of debt by granting the title over certain assets). For instance, in a syndicated loan agreement (typical in Panama) the administrative agent of the banks will most likely lead the negotiation, and the majority of lenders, or those with a larger stake in the loan, typically have more influence in swaying minority lenders towards an agreement.

There are no specific rules regarding private refinancings, reorganisations or extrajudicial agreements, therefore the process will depend on what the parties agree.

7.5 Risk Areas for Lenders

The most common risk will be solvency at the time of creation of the security, insufficiency of assets to cover the owed amount (ie, partial payment) and claw-back provisions.

In an insolvency proceeding context, the Insolvency Law provides for certain protections and restrictions, depending on whether it is a reorganisation proceeding or a liquidation proceeding (see 7.1 Impact of Insolvency Processes).

8. Project Finance

8.1 Recent Project Finance Activity

In Panama, project finance is highly prevalent in major governmental infrastructure projects and the energy sector, amongst others. In this context, Panama made a significant advancement in 2019 by establishing the legal framework for public-private partnerships (PPPs) through Law 93. This framework is crucial for the development and financing of public projects throughout the country.

8.2 Public-Private Partnership Transactions

The regulation of public-private partnerships (PPPs) was established through Law 93 on 19 September 2019, and further regulated by Executive Decree 840 of 31 December 2020. This regulatory framework emphasises the distribution of risks and resources to facilitate the creation, development, improvement, operation, and maintenance of public infrastructure for the provision of public services.

According to the regulation, PPP projects can originate from two sources: the contracting public entity, provided they are included in the five-year investment plan or listed by the Cabinet Council, or through recommendations from the National Secretariat of PPP, if they align with the contracting entity's sectoral development objectives or strategic planning. Additionally, there are two types of PPPs: self-financed and co-financed.

Law 93 specifically excludes from its scope government institutions such as the Panama Canal Authority, IDAAN (Water Authority), the Social Security Office, Banco Nacional de Panama, the Superintendency of Capital Markets, the Superintendency of Banks, Banco Hipotecario Nacional, as well as any project regarding public safety, health, education, and concessions for the extraction of metallic minerals. Additionally, Law 93 stipulates that PPP contracts must have a minimum value of USD15,000,000.00, except for certain municipal projects. The total annual commitments should not exceed 30% of the projected five-year investment plan, and the overall commitments must remain below 7% of Panama's GDP.

Under this recent regulatory framework, in January 2024, the PPP project for the rehabilitation and improvement to performance standards of the Eastern Pan-American Highway was awarded to Intervial Chile, S.A., one of the companies that participated in the public bidding process. The project is currently in its execution phase. Further, the government has two additional PPP projects in the pipeline for the coming years: the rehabilitation, improvement, and maintenance of the Western Pan-American Highway and the construction of the fourth 500 MW transmission line.

8.3 Governing Law

Typically, project documents are not required to be governed by local law or resolved in local courts or any specific jurisdiction unless such stipulations are contractually specified as part of the tender process. Nonetheless, depending on the sector it is typical for some of these to be subject to Panamanian law and jurisdiction.

Despite the above, for example, under Law 93 of 2019, any disputes or claims related to the inter-

pretation, application, or execution of the PPP contract must be resolved through arbitration after a period of direct negotiation. The arbitration will be conducted in Panama City, Panama, in Spanish, and the applicable law will be that of the Republic of Panama.

8.4 Foreign Ownership

Panamanian legislation imposes certain restrictions on the ability of foreign entities to own real property (both surface and subsurface) in connection with specific projects.

For example, the Panamanian Political Constitution dictates the following restrictions:

- Foreign individuals or entities, as well as domestic entities with foreign capital, either fully or partially, are not permitted to acquire ownership of national or private lands located within ten kilometres of the borders.
- The wealth of the subsoil belongs to the state but may be exploited by state or mixed enterprises or subject to concessions or contracts as established by law.
- The lands and waters allocated to public services and all types of communications, as well as lands and waters designated or that the state designates for public services, such as irrigation, hydroelectric production, drainage, and aqueducts, belong to the state.
- No foreign government, nor any foreign official or semi-official entity or institution, may acquire ownership of any part of the national territory, except in the case of embassy headquarters, in accordance with what is stipulated by law.

Regarding water rights, depending on the project, a water use concession may need to be requested from the Ministry of Environment.

8.5 Structuring Deals

In Panama, foreign investment is generally unrestricted, though certain activities may have limitations for foreign governments or government-owned entities. A detailed review of the project scope and an understanding of the involved bilateral treaties, such as those for tax benefits, might be necessary.

Often, the project companies are structured as corporations (*sociedades anónimas*). However, if a shareholder of the project company is a US national, the company is typically structured as a limited liability company (*sociedad de responsabilidad limitada*) to address certain US tax considerations.

8.6 Common Financing Sources and Typical Structures

In Panama, typical financing sources and structures for project financing include:

- Bank financing: This includes both local commercial banks and international banks with operations in Panama. International banks often offer larger-scale financing for major infrastructure and industrial projects.
- Export Credit Agency (ECA) financing: ECA financing has been instrumental in several major infrastructure projects such as the Panama Canal expansion and the Metro Line 3.
- Project bonds: This includes both local bonds issued in the Panamanian capital market and bonds issued in international markets.
- Alternative source of funding: project financing in Panama often involves multilateral development banks and development finance institutions. Private equity funding is commonly seen in renewable energy projects.

8.7 Natural Resources

Under the Panamanian jurisdiction, any project that involves the extraction of natural resources will most likely require the approval of the Ministry of Commerce and Industry and the Ministry of Environment or other applicable entity depending on the resource. Additionally, depending on the activity, a duly approved Environmental Impact Assessment (EIA) can be required for the applicable institution to grant the permit or authorisation linked with the natural resources project.

8.8 Environmental, Health and Safety Laws

Law 41 of 1998 (General Environmental Law) and Executive Decree 1 of 2023 (which regulates Chapter 3, Title 2 of Law 41 of 1998) are the principal environmental laws applicable to projects in Panama. The Ministry of Environment is the authority responsible for all environmental matters across the country but Law 41 of 1998 also established special prosecutors to investigate alleged environmental crimes and designated the Public Prosecutor's Office as responsible for initiating investigations and conducting discovery to determine liability for such offences.

Projects will most likely require environmental impact assessments (EIAs), and their approval often requires public consultations. Additionally, under Law 6 of 2002, state institutions at the national and local levels are obligated to allow citizen to participate in all public administration acts that may affect the interests and rights of groups of citizens, such as infrastructure projects. This participation can take various forms, including public consultations, public hearings, forums or workshops, and direct participation in institutional bodies.

Regarding health and safety measures, the Sanitary Code regulates all matters related to public health and hygiene, sanitary policing, and preventive and curative medicine. The Ministry of Health is the responsible authority for overseeing compliance with these regulations.

Trends and Developments

Contributed by:

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Morgan & Morgan is one of the largest and most recognised full-service law firms in Panama, with roots dating back to 1923. The firm has extensive experience assisting both local and multinational corporations from various industries, including recognised financial institutions and government agencies. Additionally, the firm also caters to the legal needs of individual clients. The firm's banking and finance team is comprised of two leading partners, four supporting partners and three associates. The practice has broad expertise and has participated in numer-

ous financing transactions, acting on behalf of both creditors and debtors. It focuses mainly on drafting loan and security documentation associated with complex financing transactions, setting up leasing and/or factoring facilities, both as lender or borrower counsel, and managing all legal aspects related to banking acquisitions and mergers. On banking operations, the team has assisted many banks and financial institutions in the process of obtaining licenses, as well as ongoing regulatory assistance related to their operations in the country.

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Public-Private Partnerships

In his inaugural speech, Panama's new President, José Raúl Mulino, announced that his government will introduce austerity measures to alleviate pressure on the state's finances, while simultaneously promoting investment in public infrastructure. It is anticipated that his administration will push for several of the major government infrastructure projects that are part of his government's plan to be carried out through public-private partnerships (PPPs) in accordance with Law 93 of 2019, as regulated by Executive Decree 840 of 2020 and Executive Decree 119 of 2023 (together referred to as the "PPP Law").

Pursuant to the PPP Law, which was enacted into law by President Mulino's predecessor, the Panamanian government took a decisive step forward in developing a PPP legislative framework, as a means of:

- developing major infrastructure projects without increasing government debt levels;
- encouraging private investment and job creation; and
- enhancing Panama's competitive standing compared to other Latin American countries (many of which enacted successful PPP legislation some time ago).

Prior to the enactment of the PPP Law, Panama had undertaken public-private sector collaborations for various projects, including toll roads, water treatment plants, ports, telecommunications networks, and electricity generation and distribution. However, these projects were governed by a general concessions law from 1988, sector-specific legislation enacted in the mid-to-late 1990s, or the general public procurement law from 2006.

The PPP Law is designed to attract private investors, not only for their financial contributions but also for their know-how, technology, equipment, and operational capabilities. These resources will be used to "create, develop, improve, operate and maintain public infrastructure for the provision of public services." The PPP law both allows and requires the private sector to develop, finance, build, operate and maintain – for an amount of time specified in the corresponding contract – projects geared to provide public services (eg, roads, bridges, subway lines, electric transmission lines, etc). The PPP Law provides for a maximum contract length of 30 years (which can be extended for up to 10 additional years). Thus, the idea is for the state to enter long-term partnerships with investors that have the requisite experience to not only build, but also operate and maintain these projects, meeting the service and quality standards established in the RFP documents as well as the PPP contract.

Unlike the existing public procurement and administrative concession laws, under the PPP Law, PPP contracts involve not only the contracting government entity and the PPP contractor, but also three new government entities, detailed below.

- The Governing Body (in Spanish, the "Ente Rector"): This body is comprised of the Minister of the Presidency (who will preside over it), the Minister of Public Works, the Minister of Economy and Finance, the Minister of Commerce and Industries and the Minister of Foreign Affairs. In addition, the Comptroller General of the Republic will be a part of it and entitled to voice her/his opinion at meetings (but not vote). The Ente Rector is in charge of authorising the drafts of technical reports on projects that may be subject to implementa-

tion as PPPs, approving projects to be structured as PPPs and the request for proposal (RFP) documents (including the draft PPP agreement), as well as approving any changes to the PPP contract once it is in force.

- The National PPP Secretariat (or “SNAPP”, for its Spanish acronym): This secretariat serves under the Ministry of the Presidency and its functions include providing technical and operational support to the Ente Rector, as well as developing the criteria for selecting PPP projects, the guidelines for assigning risks and granting guarantees, as well as the guidelines for the design of the RFP documents and model PPP contracts. The SNAPP also serves as a link between the PPP contractor and the Ente Rector, once a project is underway.
- The Advisory Committee: This committee is made up of four members of the business sector, two members of the academic sector and two representatives of organised labor. The Advisory Committee can recommend potential PPP projects to the Ente Rector, through the National PPP Secretariat.

To determine whether a PPP project can go forward, and the bidding process initiated, preliminary studies must be carried out based on six eligibility elements established in the PPP Law (social benefits, economic cost-benefit analysis, risk allocation, service indicators, feasibility studies, as well as environmental and legal aspects). The contracting government entity (in Spanish “*entidad pública contratante*”), which is the government entity contracting with the PPP contractor for the development of the relevant project, must then prepare a technical report, subject to the opinions and observations of the National PPP Secretariat, which must then be sent to the Ente Rector, so that it can decide

whether the project will be bid out as a PPP project.

The selection of PPP contractors will be carried out based on objective criteria, since the contract will be awarded to the bidder that meets the mandatory requirements and submits the best economic offer. In addition, there are clear limits on the amounts and time periods for which PPP contracts can be modified. These provisions seek to eliminate subjective factors in awarding PPP projects, as well as avoiding overly expensive amendments to PPP contracts.

In order to facilitate financing structures – either through syndicated credit facilities or through capital markets – the law provides for the option (or, in case the project is partially funded through government subsidies or contributions, the obligation) for the assets involved in the project to be placed into a trust to be managed by a trustee that is licensed in Panama.

The grounds for disqualification currently included in the existing public procurement law are toughened, as these will disqualify bidders for a ten-year period, rather than the five-year period established under the public procurement law.

Also, it is important to bear in mind that there are certain situations in which projects are excluded from being developed under the PPP Law, and also there are certain services and institutions that cannot contract under the PPP Law. Namely:

- Projects cannot be implemented as PPPs in any of the following cases:
 - (a) if existing commitments under government contracts then in force exceed 30% of actual investments in the previous year;
 - (b) if existing commitments in the following

five years – under contracts then in force – exceed 30% of the projected investment of the contracting public entity, pursuant to the government’s five-year investment plan in the respective fiscal years; or

- (c) the total cumulative present value of existing commitments of the non-financial public sector in PPP contracts exceeds 7% of gross domestic product.
- Projects with a value of less than fifteen million dollars cannot be tendered as PPPs, except in the case of municipal projects, in which case the criteria for granting exceptions will be further developed in the regulations that will be issued after the law comes into effect.
- The National Institute of Aqueducts and Sewage (IDAAN, for its acronym in Spanish), the state-owned water company, the Panama Canal Authority, the Social Security Administration and the governmental financial entities and regulators, may not contract for any work or service under the PPP Law.
- Furthermore, public health, education and public safety services cannot be contracted by any government entity under a PPP structure.

It is possible, however, that once PPPs begin to be implemented under the new law, and given the fiscal policies of the new government, the political climate will allow the excluded entities and/or services to contract under the PPP Law, provided amendments are introduced.

To date, only one project, the Carretera Panamericana Este project, a project to rehabilitate and maintain a 246.2 km stretch of road from Panama City to Yaviza, Darien, has been adjudicated and is in its execution phase. However, the Ente Rector’s website currently has two other

projects in its pipeline, both of which are at the “feasibility” stage:

- the Carretera Panamericana Oeste project, involving the rehabilitation and maintenance of a 200 km highway stretching from Panama City to Santiago Veraguas; and
- the Fourth Transmission Line, involving the design, construction, installation, implementation, administration and maintenance of a transmission line running from the province of Bocas del Toro to the province of Panama.

There has been much speculation that the Panama-David Train, the flagship project of President Mulino’s government, which consists of a railroad running from Panama City to David, may be implemented under a PPP structure. Although not much has been said about this project, a commission set up by the President to co-ordinate the construction of the railroad has estimated that it will have a cost of USD5 billion. Carrying out the project under the PPP legal framework would certainly take some of the pressure off the state, but such decision has not been made as of the date of this publication.

Considering the much-needed development of major projects without requiring substantial short-term disbursements of public funds, the expectation is that many more PPP projects will come along during this new administration, which will be in power until 2029.

Fintech

In recent years, both local and international interest and investment in fintech companies have grown significantly in Panama. These developments have created exciting opportunities in the local market, with established players seeking to implement innovative business models and new entrants aiming to capitalise on opportunities in

the financial services sector. This has led to the emergence of various solutions, including digital wallets and payment service providers, offering alternative methods for conducting financial transactions.

Sustainable Financing

Support for and interest in sustainable financing has increased among local banks, extending beyond the loan market and into capital markets. Panama has witnessed the issuance of its first green bonds. Additionally, as published by the Superintendence of Bank, in 2024 Panama became the third country in Latin America and the Caribbean and the first in Central America to launch its Sustainable Finance Taxonomy, which was a result of the joint work of public and private entities and local regulators to align financing and environmental goals.

CNOs and IPTs

Legal instruments known as “*Certificados de No Objeción*”, “*Cuentas de Pago Parcial*” and “*Informes de Progreso de Trabajo*” have been created and issued by the government to enhance the bankability of local infrastructure projects. Over the past decade, these instruments have been commonly employed in several major government infrastructure projects as part of the payment structure. By creating a payment obligation independent from the daily operations of the project, they provide a more secure and reliable payment mechanism. Furthermore, subject to specific terms and conditions, these instruments can be freely assignable.

Credit Agreements and Security

Financing in Panama is typically structured through credit agreements, involving a combination of local and/or foreign financial entities, depending on the size and scope of the project. A standard collateral package often includes a range of security instruments such as trust guarantee agreements, pledge agreements, mortgage agreements, and collateral assignment agreements.