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Panama

Rodrigo Cardoze and Ricardo M Arango*
Arias, Fábrega & Fábrega

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OVERVIEW OF THE LENDING MARKET

1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

In the past 12 months there has been a slight trend towards capital markets financing. While more straightforward loan financing remains popular, borrowers are tapping into the loan capital market to take advantage both of investors' high liquidity in Panama, and the tax advantages afforded to financing that is structured through the local stock exchange.

FORMS OF SECURITY OVER ASSETS

Real estate

2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? What formalities are required?

Real estate

Real estate in Panama is called "immovable property" and includes the following:

- Land and buildings, including roads and constructions that are annexed to the land.
- Trees, plants and produce that are annexed to the land.
- Property that is annexed or fixed to the land in such a way that it cannot be removed without damaging either the land or the property.
- Statues, paintings and other objects of "use or decoration" that are placed by the owner of the object with the intention of permanently affixing them to the land.
- Machinery, vessels, instruments or tools used by the owner of the land to exploit or work on the land, or property on the land, which are essential for that exploitation or work.
- Animal nurseries (and other similar breeding sites) that the owner places on the land with the intention of permanently affixing them to the land.
- Fertiliser in the land and fertiliser used to cultivate the land.
- Mines, quarries, and slag heaps, together with still or moving water.
- Dikes and property constructed on water that is intended to remain in a fixed point in a river, lake or on the coastline (even though they are floating).

- Public works concessions, covenants and easements, rights of way and other rights arising out of immovable property.

Ships and other similar vessels are classified as movable property under shipping law, allowing them to be mortgaged (*see below, Formalities*).

Common forms of security

The most common form of security over immovable property is a real property mortgage.

Formalities

To create a mortgage, the registered owner of the land must enter into a mortgage contract with the lender using a public deed. This must be executed before a notary public in Panama, and then recorded and filed at the Public Registry Office. In addition, to enforce the mortgage contract, the obligation(s) contained within it must be "clear and past due". This means that the terms of the contract must be clearly stated, including the:

- Amount payable.
- Date when that amount becomes due.

Special rules apply to ships and other vessels. A mortgage on a Panamanian vessel can be granted once it is registered provisionally in Panama and title has passed to the borrower. The vessel must be registered before the mortgage can be granted, and the mortgage itself must also then be registered. There is no specified form for the mortgage of a vessel, and it can be in any form or language, and contain any lawful covenant, term or condition. This mortgage can also secure any type of obligation, whether existing, simple, conditional or future.

Tangible movable property

3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? What formalities are required?

Tangible movable property

Tangible movable property includes all property that can be transported from one point to another without damaging the immovable property to which it is attached. This includes aircraft (*see below, Common forms of security*).

Plant and machinery can constitute immovable property, depending on their use, and some property generally considered to be movable by nature (such as ships) can be subject to real estate mortgages as a result of special legislation (*see Question 2, Real estate*).



Common forms of security

Pledge. Pledges are the most common form of security granted over tangible movable property. A pledge can be created over any tangible movable property that is located in Panama and is capable of being possessed and delivered. If the borrower defaults on the obligation to the lender, the lender's recourse is to execute the pledge and sell the tangible movable property in question.

Chattel mortgage. Tangible movable property can only be mortgaged if it is individually identifiable and capable of independent description. The purpose of a chattel mortgage is to allow the encumbered movables to remain in the possession of their owner (in contrast to the pledge) (*see below*). Tangible movable property that has already been attached to mortgaged land cannot be mortgaged separately. Chattel property can also not be remortgaged until the first mortgage has been released. Chattel mortgages cannot exceed a four-year term, unless the lender is a banking entity and the loan is for industrial, agricultural or agro-industrial projects. If the borrower defaults on the obligation to the lender, the lender's recourse is to execute the chattel mortgage and sell the tangible movable property in question.

Mortgages over aircraft. Aircraft can be mortgaged under the Convention on International Interests in Mobile Equipment 2004 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment 2006.

Formalities

Pledge. A pledge must be created in writing, either by executing a public deed or by executing a private document. A pledge executed in a public deed automatically affects third parties on its execution. However, a pledge created by a private document will only affect third parties when one of the following events occurs:

- The pledge is registered in an official registry.
- The pledge is registered in a notary's registry.
- One of the signatories to the pledge dies.
- The pledge is executed in the presence of a notary.
- The pledge is delivered to any other public official in the exercise of an official function.
- There is an act before a public official which allows a court to determine the certain date of the pledge.

The pledge must be delivered to a creditor or depositor, although this delivery can be real or symbolic. The rules governing the sale of movables, which also apply to delivery of the movable, should be applied to ensure that the pledge is "delivered" as required by law. A sold movable is considered to be delivered when either:

- It is placed in the power and possession of the purchaser.
- The keys are delivered to the location where the good is stored (on the granting of a public deed).
- There is an agreement between the parties recognising delivery where the item cannot be physically transferred to the purchaser at the time of the sale.

Chattel mortgage. The property subject to a chattel mortgage must be capable of being "specifically identified and described" in the chattel mortgage contract. The mortgage contract must be executed in a public deed and registered at the Public Registry Office. This registration effectively gives notice to the public that a particular chattel is encumbered and can neither be sold, nor

encumbered a second time. Persons found to have granted a chattel mortgage on a previously encumbered chattel can be subject to sanctions (including imprisonment) under the Criminal Code.

Financial instruments

4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? What formalities are required?

Financial instruments

The most common type of financial instrument over which security is granted is shares.

Common forms of security

Pledges are the most common form of security granted over financial instruments, although shares held in dematerialised form must be pledged through their brokerage account (*see below, Formalities*).

Formalities

A pledge can be created for certificated shares by:

- Executing a pledge agreement.
- Delivering the share certificates (with blank stock powers) to either:
 - the lender; or
 - a third-party custodian mutually appointed by both the lender and the borrower.

The share certificates must subsequently remain at all times in the lender's or custodian's physical possession.

- Recording the pledge on the company's register of shares.

There are no other formalities that apply, except when dealing with the shares of a company that has a concession agreement with the government of Panama. In this instance, the consent of the government is usually required prior to the granting of the pledge.

Shares held in dematerialised form cannot be pledged in the same way as certificated shares, because it is impossible to meet the requirement that the lender take physical possession of the shares. Instead, the brokerage account that manages the dematerialised shares is usually given as security. A pledge over the brokerage account can be granted either by a private contract, or by a public deed. In both cases, the signatures must be notarised. If the pledge document is entered into, or issued, outside of Panama, the signatures will need to be apostilled or authenticated by the Panamanian consul.

Claims and receivables

5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? What formalities are required?

Claims and receivables

The most common type of claims and receivables over which security is granted are rights under contracts.



Common forms of security

The most common form of security granted over claims and receivables is an assignment. An assignment passes the right(s) of the assignor (the owner of the claims or receivables) to the assignee (or their security agent).

Formalities

Assignments are created by private documents between the assignor and the assignee (or their security agent). In certain circumstances (such as a power purchase agreement) the person(s) owing the debt or right under the claims/receivables must also consent to its assignment. In the case of a power purchase agreement, the consent of the public utilities regulatory agency is also required.

Cash

6. What are the most common forms of security over cash deposits?

The most common form of security over cash deposits are pledges. Security is usually granted by a private contract between the pledgor and pledgee. There are no specific formalities other than notarisation of the parties' signatures at signing.

If the cash deposits are in favour of a third-party pledgee that is not the bank where the actual cash deposits are held, it is recommended that the pledge agreement between the pledgor and the pledgee:

- Be acknowledged by the bank.
- Include language to ensure the bank specifically recognises that the cash deposits have been pledged in favour of the pledgee, and that the pledgee now exerts control and custody of said cash deposits.

This is necessary to meet the "delivery" requirement which is an essential element of all pledges in Panama.

Intellectual property

7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? What formalities are required?

Intellectual property

The most common types of intellectual property over which security is granted are patents, designs, trade marks and copyrights.

Common forms of security

Intellectual property, including patents, designs and trade marks, can be freely transferred under the laws applicable for each type of intellectual property (see below, *Formalities*). Copyright can also be freely transferred. However, any transfer of the rights to future works, or any negative pledge prohibiting a person from creating future works, is void.

Formalities

A transfer of intellectual property (other than copyright) must be registered with the Directorate General of the Industrial Property Registry (*Dirección General del Registro de la Propiedad Industrial de Panama*) (DIGERPI), before it can be enforced against third parties. Copyright must be registered with the Copyright Office of the Ministry of Education. Transfers of copyrights must be in writing to be effective against third parties.

Problem assets

8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?

Future assets

A mortgage can be created as security for subsequent disbursements or future obligations. It is possible to execute and record the mortgage at the time the transaction closes, even where some of the essential elements of a mortgage are not, at the time, determined, such as the:

- Total amount of indebtedness.
- Repayment schedule.

Once the money has actually been paid out, a supplementary deed (known as a marginal notation) must then be filed with the Public Registry incorporating those missing details, so that the mortgage documentation as a whole is complete. Since recorded mortgages are satisfied in the order of the initial filing at the Public Registry, this type of mortgage (*hipoteca de máximo*) is a useful financial instrument.

A pledge can also be created over future movable property. In this case, the sale of the property must be perfected so that title is deemed to transfer to the lender subject only to the condition that the property actually arise in the future. Once the property is generated, the borrower, as seller of the future asset, must deliver the movable property previously sold, since the lender will have pre-paid the price pursuant to the financing.

For the borrower to satisfy its delivery obligation, the sales contract must be executed in the form of a public deed. This allows the contracting parties to take advantage of the Civil Code, which provides that the execution of a public deed can constitute delivery of (future) movable property sold under this formality.

Fungible assets

Pledges can be granted over fungible assets (for example, funds in a bank account). These pledges frequently contain negative covenants (for example, a requirement that the account not be liquidated). Fungible assets that are payable at a fixed place and time can also be assigned, by a simple endorsement, if the document is payable "to the order of" the beneficiary.

Other assets

There are no other assets that are difficult to grant security over, or that cannot have security granted over them.

RELEASE OF SECURITY OVER ASSETS

9. How are common forms of security released? Are any formalities required?

To release real property mortgages and chattel mortgages, a public deed cancelling the mortgage must be:

- Signed by both parties.
- Registered in the Public Registry Office.



Pledges are usually released by returning the property over which the pledge was granted. For example, in the case of a pledge over shares, the original share certificate should be returned and the corresponding annotation should be made in the share registry.

It is also common (although not required) for the parties to the pledge agreement to sign a private agreement acknowledging that all the terms and conditions of the pledge agreement are satisfied and that the pledged item has been released.

SPECIAL PURPOSE VEHICLES (SPVs) IN SECURED LENDING

10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?

It is possible to take security over the shares of an SPV set up to hold a debtor's assets, rather than take direct security over those assets. However, this structure is unpopular because the process of transferring the assets to the SPV can be very cumbersome, particularly since there can be negative tax implications for the borrower. For example, if the assets in question are real estate assets, a 2% transfer tax would be applied when transferring the asset from the owner to the SPV. Similarly, if the assets are shares, then a capital gains tax will be applied to the transfer. Once an SPV has been established, it is common to take securities over its shares, often in conjunction with taking direct security over other assets.

Alternatively, a structure such as a trust can be established to hold a debtor's assets or receivables, as there can be certain tax advantages applicable to this type of structure. For example, distributions made to beneficiaries of a trust are not subject to a dividend tax. However, this structure may also trigger the payment of other taxes (see *Question 19*).

QUASI-SECURITY

11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

As security interests in Panama are those that are contained in the Civil Code, there is very little risk that quasi-security structures would be recharacterised as security interests. This is a different Code (*Código Civil*) from the Code of Commerce (*Código de Comercio*).

Sale and leaseback

This structure is available in Panama, and is structured as a simple sale and lease contract. Proper consideration must be given for the sale, and the assets must, in fact, be transferred to the purchaser.

Factoring

To date, factoring is unregulated in Panama. However, there are several companies in Panama dedicated to this practice and it is a growing industry.

Hire purchase

Hire purchase arrangements are not commonly used in Panama, although there are no legal restrictions prohibiting the practice.

Retention of title

Retention of title is not possible in Panama, as the fundamental aspect of a pledge is that title is transferred from the borrower to the lender.

Other structures

There are no other quasi-security structures commonly used in Panama.

NEGATIVE PLEDGE

12. Are negative pledge clauses commonly used in your jurisdiction?

Negative pledges are common in Panama, particularly in the context of the covenants of loan agreements.

GUARANTEES

13. Are guarantees commonly used in your jurisdiction? How are they created?

Guarantees are very common in Panama, and are created by private contractual arrangement between the parties. Commercial guarantees must be created in writing to be effective. Guarantors can be either jointly, jointly and severally, or severally liable with the borrower, depending on the terms of the agreement.

It is necessary for the guarantor's board of directors and/or shareholders to authorise the guarantee.

RISK AREAS FOR LENDERS

14. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?

Financial assistance

A Panamanian corporation can guarantee, or give security, in respect of the debts of another company, irrespective of the jurisdiction where that company was incorporated, or the fact that the company is related to the guarantor. Regulated entities (such as banks) are an exception to this general position and cannot grant loans which are secured by shares in their own bank.

A company is not allowed to provide financial assistance for the purchase of its own shares.

Corporate benefit

In general, there are no rules prohibiting a subsidiary from granting security relating to a loan to its parent, subject to the rules regarding duty of care and self-dealing. The rules regarding duty of care require the corporation to take reasonable care to avoid causing harm to the company. Self-dealing rules require that security must not be granted to the detriment of the lender. There are no specific rules concerning directors obtaining a corporate benefit from transactions that are not in the best interests of the company. However, directors do owe a general duty of care to the company, and can be held personally liable for negligence for failing to exercise that duty of care.

Loans to directors

In general, there are no restrictions on making loans to directors, unless the company concerned is part of a regulated industry (such as banking or insurance), in which case some restrictions can apply. For example, banks cannot grant loans to directors under more favourable terms than are generally available in the marketplace for similar transactions. However, whenever there is a transaction between a director (or officer) and the company in which the director (or officer) has a direct, or indirect, interest, all agreements and arrangements reached must be both:

- Approved by the board of directors.
- Disclosed to the shareholders (at the next shareholders' meeting).

Usury

Panamanian law currently sets no limits on the interest that can be charged on an overdue loan.

15. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

A lender, simply by making a loan or holding a security interest or guarantee, will not become liable under environmental laws for the actions of the borrower, security provider or guarantor. However, if during the course of enforcing a security the lender takes ownership of the borrower's property, or the borrower's project, as the "new" owner the lender can be liable under environmental laws.

STRUCTURING THE PRIORITY OF DEBTS

16. What methods of subordination are there?

Contractual subordination

Contractual subordination of debt is both possible, and common, in Panama. It is usually achieved by contractual agreement between the relevant creditors, and the subordinated creditor agreeing that its claims will be subordinate to other claims. The terms of those agreements can be freely negotiated under ordinary freedom of contract principles. Contractual subordination agreements can also comprise more complex documents that involve senior, mezzanine and junior creditors, in which some creditors agree to be subordinated to others. These contractual subordination agreements are only valid as between the debtor and the creditor and do not affect third parties.

Structural subordination

Structural subordination can also occur as a result of the corporate structure of the debtor, and holding companies can be established for the purpose of structurally subordinating debt.

Intercreditor arrangements

Intercreditor agreements are common in large financing projects, where there is more than one financing agreement or arrangement in existence. They are usually private contractual agreements between creditors and debtors, in which some order of preference or waterfall arrangement is agreed.

DEBT TRADING AND TRANSFER MECHANISMS

17. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

Debt is frequently traded in Panama; the capital market in Panama is primarily a debt market. Debt securities are usually issued either in the form of bonds or commercial papers.

Bonds tend to have a maturity of one year or more, and include fixed rate bonds, floating rate bonds, variable rate bonds, zero coupon bonds, equity linked bonds, agro-industry bonds and corporate notes.

Commercial paper usually has a maturity of one year or less. It is registered with the Superintendency of the Securities Market (previously the National Securities Commission) and are subject to registration, disclosure and reporting requirements under the Securities Act (*Decree Law 1, 1999, as amended by Law 67 of September, 2011*).

In the case of both bonds and commercial paper, the most common way to ensure that buyers obtain the benefit of both the security and guarantees associated with the transferred debt is to create an indenture, or trust, agreement. The trustee or agent then holds the security interest for the beneficial interest of the security holder. The trustee or agent can then enforce the security interest and pass the payment to the security holder.

AGENT AND TRUST CONCEPTS

18. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

The agent concept is recognised in Panama and is often used, particularly in connection with syndicated loans. An agency agreement usually consists of a contractual arrangement between an administrative agent (on behalf of the lenders) and a security agent, where the security involved in the deal is in the security agent's favour. The security agent is then able to enforce the security, if necessary. This structure is very popular, and provides a less expensive alternative to setting up a trust to hold the security (*see Question 19*).

Agency arrangements created under the law of another country are recognised in Panama. A facility agent is able to enforce rights on behalf of other syndicate lenders in Panama.

19. Is the trust concept recognised in your jurisdiction?

The trust concept is recognised in Panama. A Panamanian trust is not considered a separate legal entity, but rather a legal arrangement where a person (known as the settlor) transfers assets to another person (known as the trustee), to manage and/or dispose of them as outlined in the trust deed, in favour of beneficiaries. A trust must be created by a written document (trust deed), and can include assets of any nature (present or future) that are situated



in Panama or another jurisdiction. Trust companies dedicated to the professional management of trusts also exist in Panama and are overseen by the Superintendency of Banks.

It is common practice for a security trustee to hold the security on the creditors' behalf. These trust arrangements are frequently used to provide an extra safeguard for lenders, since the trust structure provides greater protection against the borrower's bankruptcy, and shields the assets in question from other creditors. However, trust structures can be more expensive than a basic agency structure (see *Question 18*) since the assets must be transferred to the trust, which can attract transfer tax. A trust created under the law of another country is recognised in Panama.

SECURITY AND LOAN DOCUMENTATION

20. Do the different types of security in your jurisdiction need to be documented separately or does your jurisdiction allow a single security document?

Panama does not allow a single security document, and different types of security must be documented separately.

21. What (if any) are the rules on how loans (including syndicated loans) should be documented for the loan to be enforceable?

Loans must be documented in writing to clarify the terms of the agreement. In the absence of a clear determination of the agreement's terms, the Code of Commerce stipulates that interest will be calculated according to the current commercial rate. There are no particular requirements to ensure that a loan is enforceable outside of the general rules for contracts, and registration or authorisation is not required.

ENFORCEMENT OF SECURITY INTERESTS AND BORROWER INSOLVENCY

22. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

The terms for enforcing a loan, guarantee or security are defined in the relevant agreement. Defaulting events commonly include the borrower:

- Failing to make any payment due on the principal, interest, fees or charges.
- Breaching one of its material obligations under the contract.

There are no particular requirements that a creditor must comply with. Secured creditors can enforce their guarantees or security by way of an expedited process in certain circumstances (see *Question 23*).

Methods of enforcement

23. How are the main types of security interest usually enforced? What requirements must a lender comply with?

The main types of security interest are enforced as follows:

- **Mortgage.** A mortgage is enforced using the executive mortgage process (*proceso ejecutivo hipotecario*). The lender applies to court. To obtain the order, the:
 - obligations secured must be clear and past due (*clara y exigible*);
 - fact that a default has occurred should be readily ascertainable from the agreement itself;
 - amount owed must be determined or determinable.

In the absence of proof of payment, the court will order the judicial sale of the mortgaged property.

- **Pledge.** On default, the pledge will be sold to pay the lender. The standard remedy in the Code of Civil Procedure (*Código Judicial*) to enforce a pledge is the executive pledge process (*proceso ejecutivo prendario*), which involves the lender applying to court for the judicial sale of the pledged property in an attempt to realise its market value.

The Code of Commerce also provides that the parties can contractually incorporate a special sales mechanism which triggers in the event of a default. Finally, where the pledge agreement does not provide this mechanism, the creditor (or depositor) holding the pledge can dispose of the asset through a private sale, following a specific appraisal process to ensure that the full value of the asset is realised. The advantage of a judicial sale over a private sale is that, in the case of a judicial sale, the purchaser can be certain that they are purchasing the property free and clear of any liens.

Unsecured creditors must seek payment in court, which is significantly more complicated and time consuming than the executive processes available to secured creditors.

Rescue, reorganisation and insolvency

24. Are company rescue or reorganisation procedures (outside of insolvency proceedings) available in your jurisdiction? How do they affect a lender's rights to enforce its loan, guarantee or security?

Panamanian law does not recognise corporate reorganisations, although parties are free to negotiate extra-judicial restructuring agreements prior to a declaration of insolvency. Only regulated entities (such as banks and broker-dealers) are subject to reorganisation procedures in Panama.

Reorganisations of banks are overseen by the Superintendent of Banks, who:

- Will appoint an individual or a board to administer the bank throughout the process.
- Can order the removal of any director, officer, executive, administrator or employee, as necessary.
- Will establish a time frame within which the reorganisation should be completed.



The individual or board overseeing the reorganisation is granted broad powers and is tasked with establishing a plan to ensure that the bank operates efficiently and securely, and takes into consideration the interests of all depositors, creditors, shareholders and partners. The plan, once approved by the Superintendent of Banks, is binding on all parties. A similar process is followed in the case of the reorganisation of broker-dealers.

25. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee or security?

All civil actions brought against a bankrupt individual and insolvent company in any court within four years before the date of the declaration of bankruptcy must be transferred to the bankruptcy court, including creditors' claims for enforcement. These actions are then heard by the bankruptcy court and actually become part of the bankruptcy proceedings. The effect of this is to stay any individual actions brought by creditors against the bankrupt. However, secured creditors (creditors secured by a mortgage, pledge or other similar lien) can enforce their secured claims, using an executive process (for up to the value of the security they hold) outside of the bankruptcy court. For any additional claims, secured creditors must go through the bankruptcy court (see *Question 23*).

26. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?

Once a court declares a bankruptcy, it determines a "date of bankruptcy": this is usually the date that the petition for bankruptcy was filed, but it can be set back in time up to four years and 30 days before this filing date. The period between the date of bankruptcy and the declaration of bankruptcy is known as a "review period". Certain acts of the debtor completed within this review period can be considered and, where appropriate, set aside.

Acts subject to review include the following:

- For acts that took place within the review period preceding the date of the insolvency:
 - any gratuitous act or contract of the bankrupt, or those not supported by adequate pecuniary consideration;
 - pledges, mortgages or other security interests or stipulations created to secure pre-existing debts or to create a preference over other debts; and
 - the payment of debts that were not yet due and payable, and the payment in kind of debts.
- Regardless of the time that they took place:
 - acts or contracts in which there had been simulation or fraud;
 - gratuitous or onerous transfers where the other party knew that the debtor executed the act (or entered into the contract) for the purpose of extracting or hiding the assets from the creditors of the debtor.

27. In what order are creditors paid on the borrower's insolvency?

All claims to be liquidated against the bankruptcy estate must be presented to, and classified by, a board of creditors during the period of administration of the estate. However, secured creditors

are entitled to enforce their claims separately by the executive processes discussed above (see *Question 25*). Secured creditors can receive payment from the proceeds of sale of the collateral following this process, and then become unsecured creditors with respect to any unrecovered amounts. With respect to real property rights, only debts in favour of the state would "win" over a secured creditor holding a mortgage over the property.

Outside of these executive processes, employee salaries, loans and indemnities take preference over all other creditors (including preferred and state creditors) (*Labour Code*).

Secured creditors' claims are ranked according to the property to which they are attached (*Civil Code*):

- **Movable property.** Certain debts are given preference, such as debts:
 - for construction, repair and maintenance;
 - for the purchase price of movables in the debtor's possession;
 - secured by a guarantee of personal effects or securities;
 - for rental payments of up to one year.

If two or more debts apply to the same movable, they are paid in the following priority:

 - debts secured by a pledge exclude all others;
 - debts secured by a guarantee of personal effects or securities rank among themselves according to their date of creation;
 - debts for advances of agricultural expenses rank above debts for rental payments;
 - all other debts are shared pro rata among themselves.
- **Real property rights.** Debts are paid in the following order of priority:
 - debts in favour of the state (for example, for taxes due in respect of the property);
 - debts from insurers for payments made in respect of the property over the last two years;
 - debts in respect of a mortgage are the next in rank (where there are two or more mortgages in respect of the same property, they rank in date order according to when they were filed at the Public Registry);
 - finally, debts preventatively recorded with the Public Registry Office in accordance with a court order for seizure, attachment or execution of a judgment against the property for subsequent claims. Where there are two or more debts, they rank in the order that they were recorded at the Public Registry Office.

Once all secured credits are paid, any sums left over are added to the remaining assets of the bankrupt debtor. This bankruptcy estate becomes available to pay off all unsecured creditors, as well as any amounts left unsatisfied in respect of the secured creditors. These debts are ranked in the following order:

- Debts owed to municipal authorities.
- The following debts are ranked second:
 - debts related to the expenses of the bankruptcy;
 - funeral expenses;
 - up to one year of medical expenses;



- salaries for domestic help;
- advances made to the debtor or his family, with respect to food, clothing and shoes; and
- support payments during the bankruptcy trial.
- Debts which are evidenced in:
 - public instruments;
 - executed judgments arising from litigation; or
 - private documents certified by the Public Notary.

Finally, subordinated creditors are paid according to the terms of the subordination agreement to which they are a party (see *Question 16*).

At any time during the administration period the debtor and creditors can come to an agreement between themselves to settle all claims, provided this agreement is approved by the creditors holding at least 75% of the outstanding claims. In practice, extra-judicial restructuring agreements are often used, since they give the creditors more control over the situation than they would have if it was administered by a bankruptcy court.

28. If more than one lender holds the same security interest over the same asset, how is priority between them determined? Do any specific ranking rules apply?

If more than one creditor holds the same security interest over the same asset, priority is determined between them according to the date that the security interests in question were granted (certain date). For this reason, the date of the document creating the security document must be clearly established, or there is the risk that an unsecured credit can be outranked by an authenticated document containing a credit which was actually created later in time. For documents created by a public deed, this date is easy to determine and verify. The certain date of private documents must be established according to one of the following events:

- It is registered in an official registry.
- It is registered in a notary's registry.
- The death of one of the signatories.
- It is executed in the presence of a notary.
- It is delivered to any other public official in the exercise of an official function.
- There is any other act completed before a public official which allows a court to determine the certain date of the document.

A notary public holds a particularly important position in Panamanian civil law tradition, which is not comparable to notary publics in many other jurisdictions. As a result, it is risky for a creditor to assume that a foreign notary's acknowledgement of the security interest will necessarily be given the same recognition in insolvency proceedings as that of a Panamanian notary.

29. If a security interest has not been validly perfected, where does the security holder rank on the borrower's insolvency?

A security interest that has not been validly perfected cannot benefit from the executive processes that are otherwise available to secured creditors, and which allow such secured creditors

to enforce their security interests outside of the bankruptcy proceedings (see *Question 25*). A creditor in this circumstance would rank with all other unsecured creditors (see *Question 27*).

CROSS-BORDER ISSUES ON LOANS

30. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders?

There are no restrictions on the making of loans by foreign lenders or granting security or guarantees to foreign lenders. However, some taxation issues can arise if the proceeds of the loan granted are to be used in Panama, including a withholding obligation on the part of the borrower on interest payments to pay a certain amount directly to the tax authorities.

31. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

There are no such exchange controls in Panama. Funds of any denomination, and of any amount, can move freely in and out of the country at any time. It is lawful to hold funds in any denomination; however, the US\$ is legal tender in Panama and is the accepted medium of exchange. The Panamanian balboa (PAB) (which only circulates in coins) is pegged at par with the US\$ under a 1904 monetary agreement with the United States (as at 1 December 2011, EUR1 was about US\$1.3).

32. Is a foreign choice of law clause in a security, guarantee or loan agreement recognised and applied by the courts in your jurisdiction? Does local law always apply in certain circumstances?

Parties to any commercial agreement can choose the governing law of the agreement, except for:

- Government contracts.
- Where conflict of law rules provide that Panamanian law must apply (for example, contracts related to land in Panama).

Therefore, foreign investors, as well as nationals, are free to govern their commercial relations by Panamanian law or any foreign law.

Additionally, parties to a private commercial agreement can submit any dispute arising under that agreement to the Panamanian courts or to the courts of a foreign jurisdiction, as well as to arbitration or other methods of alternative dispute resolution.

TAXES AND FEES ON LOANS, GUARANTEES AND SECURITY INTERESTS

33. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security?

Documentary taxes

A pledge, once granted, should be registered. Pledges registered in a private agreement are subject to a stamp duty of US\$0.10 for each US\$100 (or fraction of US\$100) of the total value of



the pledge. The taxes applicable for the enforcement of a security interest are determined by the type of security, and the type of asset involved:

- The enforcement of a real property mortgage by way of a forced sale of the property is subject to a 2% real property transfer tax.
- The enforcement of a pledge of shares is subject to a 5% capital gains tax on the sale of the shares (which is withheld by the seller), together with income tax (which is 25%), which must be paid by the lender, and is charged against the portion of the share sale price that is attributed to the interest earned by the lender.
- The enforcement of a chattel mortgage is subject to a value added tax, the Tax on the Transfer of Movable Property and the Provision of Services (the *Impuesto a las Transferencias de Bienes Corporales Muebles y la Prestación de Servicios* (ITBMS)) over the value of the asset in question.
- The enforcement of a bond payment is usually subject to income tax, which is charged against the interest earned.

Registration fees

Registration fees are payable on the registration of mortgages with the Public Registry Office. Registration is charged at US\$0.25 for each US\$100 (or fraction of US\$100) of the total value of the mortgage. The Public Registry Office also charges a nominal plot certification fee. There are no fees in connection with enforcement.

Notaries' fees

Notaries' fees are payable on the registration of mortgages with the Public Registry Office. The fees charged are US\$8 per page of the public deed, plus a notary fee (which is also calculated based on the number of pages contained in the deed). There are no fees in connection with enforcement.

34. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security?

The taxes and fees associated with granting a loan, guarantee or security are not usually considered particularly onerous and therefore additional efforts to minimise these fees are not necessary.

To minimise the cost to foreign lenders of enforcing a loan, guarantee or security interest, a gross-up provision is often included in the loan or security agreement that provides that the borrower pays the taxes applicable to the enforcement of the loan, guarantee or security interest.

Additionally, loans from foreign banks to local banks are exempt by law from paying tax on interest.

Finally, certain laws provide for tax exemptions on interest payments (for example, in the case of administrative concessions and certain tourism projects).

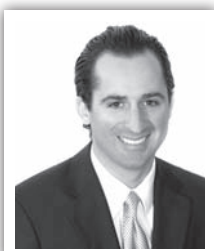
REFORM

35. Are there any proposals for reform?

There are currently no proposals for reform that are relevant to the lending market.

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CONTRIBUTOR DETAILS



RODRIGO CARDOZE

Arias, Fábrega & Fábrega

T +507 205 7000

F +507 205 7001

E rcardoze@arifa.com

W www.arifa.com



RICARDO M ARANGO

Arias, Fábrega & Fábrega

T +507 205 7000

F +507 205 7001

E rarango@arifa.com

W www.arifa.com

Qualified. US (state of Florida), 2004

Areas of practice. Banking and finance; corporations; M&A; joint ventures; securities regulation.

Qualified. Panama, 1983; US (state of New York), 1985

Areas of practice. Banking and finance; corporations; M&A; joint ventures; securities regulation; taxation.

Arias Fabrega & Fabrega (ARIFA) has been at the forefront of the legal profession since 1914. ARIFA advises leading international financial institutions, multinational corporations and some of the largest entities in Panama and Central America. The firm has a sterling reputation for providing the highest quality legal advice and is continually recognized for its expertise in structuring complex, innovative and sophisticated solutions in M&A, capital markets and financings.

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<i>Counsel to</i>	<i>In connection with</i>
Citibank	Custody agreement with Panama's clearing and settlement agency, under the sponsorship of Ministry of Finance, to open doors of Panama's capital markets to US investors
	Two ECA supported financings for the Panama City Metro Project, the single most important public infrastructure project ever undertaken in Panama
The Republic of Panama	Advising the Republic of Panama in its evaluation of alternatives for creation of a sovereign wealth fund and monetization of government assets
Global Bank Corporation and HSBC Securities	US\$395 million acquisition financing for ENA. First bond issue of newly created state-owned company to finance acquisition of most important toll-road by the government
CAF	First issue of Corporación Andina de Fomento in the Republic of Panama
Merrill Lynch	International exchange offer of notes issued by Pacific Rubiales Energy Corp., the largest independent oil and gas operator in Colombia
Global Bank Corporation	First public offer carried out in Panama
Banco General	First public bond issued by Cable Onda, S.A., Panama's leading locally owned full service telecom provider, for an aggregate total of US\$100 million
	Financing of Pedregalito, one of the largest hydroelectric projects built by Panamanian investors
Deutsche Bank	US\$45 million Petaquilla Minerals prepaid forward gold purchase agreement
CABEI and FMO	US\$45 million long-term, non-recourse project financing to Consorcio Eólico Amayo in Nicaragua
IFC	US\$160 million debt financing for San Jacinto-Tizate phase II power generating facility in Nicaragua, Central America's largest geothermal greenfield project
Scotiabank	US\$70 million factoring transaction for the construction of the Madden-Colón portion of the Transisthmian Highway of Panama
	US\$111 million factoring transactions with Constructora Norberto Odebrecht and Degrémont related to the construction of a water treatment plant in the Republic of Panama
Grupo Industrias Lácteas	Acquisition of Grupo Industrias Lácteas by Coca-Cola and Coca-Cola FEMSA
Interbank Group	Interbank Group acquisition of Peruvian pharmacy chain Inkafarma
Grupo Gildemeister	Grupo Gildemeister multi-jurisdictional acquisition of Grupo Los Tres and subsidiaries in Central America, Panama, Chile, El Salvador, Guatemala and Costa Rica
LAN Airlines	LAN Airlines US\$12 million purchase of Aerovías de Integración Regional S.A. (AIRES), Colombia's second largest airline
Oiltanking Colon	Oiltanking Colon US\$30 million stake in Colon Port Terminal and Colon Oil and Services
SAPRISA	Sociedad de Alimentos de Primera, S.A. sale to Grupo Casa Luker
Grupo Casa Luker	Casa Luker US\$91 million acquisition of Café Durán, a Panamanian coffee manufacturer with an 80% market share in Panama
Empresas Hopsa	Hopsa and Schuff joint venture for steel engineering division
ConSalfa	ConSalfa's majority acquisition of Intercoastal Marine, leading Panamanian marine contracting and engineering firm

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