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Practical cross-border insights into lending and secured finance

Lending & Secured Finance 2022

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1 Overview

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

Despite the effects of the COVID-19 pandemic, the recovery of the Spanish economy has been broad-based partly as a result of the lifting of restrictions by the public authorities as well as the various measures put in place in order to compensate for the economic and social impact of the pandemic.

At the beginning of the COVID-19 pandemic, the Spanish authorities (together with the European authorities) tackled the initial uncertainties at the outbreak of the pandemic with a cocktail of economic measures, mainly aimed at covering the liquidity needs of companies (with a starring role for a scheme of guarantees implemented through the *Instituto de Crédito Oficial* (ICO)). Whilst most of such measures remain in place, it is likely that these will be reduced in the coming months.

One such measure originally put in place and which has been repeatedly extended over the last year-and-a-half is the suspension of the debtor's duty to file for insolvency. This measure is currently due to end on 30 June 2022. As a result, it will consequently make 2022 a year of restructuring deals. However, this is not the only change foreseen for the near future that will affect insolvency matters. On 14 January 2022, the *Insolvency Act Amendment Bill for the transposition of Directive (EU) 2019/1023, of 20 June 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt* was published in the Official Gazette of the Congress of the Deputies, and a bill will be processed under the Congress' urgent procedure over the coming months. This bill entails major changes to debt restructuring, since, among others, it regulates the so-called restructuring plans (i.e., pre-insolvency instruments that are increasingly agile, flexible and with a broader scope than that of refinancing agreements, including the possibility of cramming down not only all types of creditors (financial and commercial) but also debtors). Additionally, it also provides for greater legal certainty as to the extension and effects of the purchase and sale of production units.

As an additional note, the accommodative monetary policy of the market and the reduced cost of borrowing money during 2020 and 2021 contributed to some of the highest levels of corporate indebtedness as a result of the COVID-19 pandemic, whereby traditional loans became the main source of funding for most Spanish companies.

Even with the various remaining uncertainties, the Spanish lending market remains attractive for both national and international investors. Moreover, in the past few years we have seen an increase in alternative forms of financings, such as high yield bonds, securitisations, term loans B (TLBs) and direct lending, thanks to the fact that lending is not a restricted activity in Spain. This has provided additional opportunities to new players (including non-traditional lenders) who have gained market share in comparison to traditional lending and, for this reason, we are starting to see hybrid senior-mezzanine financing structures formed by both banks and funds.

Finally, we would also note the Next Generation EU recovery funds in which Spain is a relevant player. Spain is currently developing a recovery, transformation and resilience plan, which lays out the roadmap for the modernisation of the Spanish economy, the recovery of economic growth, and job creation, mobilising close to €70 billion.

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

Corporate refinancing and debt restructuring processes

For some years now, we have been actively participating in debt refinancing and restructuring processes, including sustainable financing agreements ("green loans"), involving large national and international companies, which have required forming multidisciplinary teams with cross-border elements. Some examples include our advice in the debt restructuring of: Abengoa refinancing (€3 billion); Corte Inglés (€2 billion); OHL (€1 billion); Europastry (€800 million); Lecta Group (€700 million); Bergé (€650 million); Comsa Group (€487 million); Elecnor (€450 million); Ferroglobe (€350 million); and Cementos Molins (€300 million).

Project and real estate finance

Our team was very active last year and was involved in several projects in Spain and abroad, particularly in Latin America.

In Latin America, we note our advice given in the following projects: financing to add a third lane to the Bogotá-Girardot two-lane highway (Colombia) (US$195 million); a bridge loan to finance the pre-construction costs of the first metro line in Bogotá (US$178 million); the financing for the modernisation of the Salaverry port in Peru (US$132 million); and the financing for the construction and operation of two renewable energy projects in Chile, with a total installed capacity of 153 MW (US$103 million).

In Spain, we advised in: the financing to build the San Serván 138 MW photovoltaic plant (the first Climate Bond-Certified green transaction in Spain); the financing to build and operate five photovoltaic plants with a total capacity of 250 MW (€92 million); and a long-term financing under a PPA of a 49.9 MW photovoltaic project.

Distressed debt

We are one of the most specialised law firms advising on distressed debt transactions, acquisition of corporate debt, loan portfolios and restructuring debt processes. We have been chosen by major international and prestigious funds and have advised either the distressed/special situations funds (as a purchaser), or the financial institution (as a seller) in many significant deals. Among others, some recent transactions include: Project MoMa; Project Pompidou; Project Dakar; Project Hermitage; Project Louvre; Project Higgs; and Project Explorer, clearly showing the Spanish banks' interest in cleaning up their balance sheets and international investors' interest in Spanish assets.

2 Guarantees

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

Although some financial assistance restrictions need to be taken into consideration (see question 4.1 below), there are no significant legal restrictions to corporate guarantees. Having said that, there are certain formalities that need to be conducted when granting guarantees for the benefit of other members of their group, such as the shareholders' approval attesting that they are aware of the transaction and that they are confident that the transaction envisioned is sound from a general corporate perspective and will benefit the group as a whole. Unlike other EU jurisdictions, there is no specific obligation for Spanish companies to justify that they are acting for corporate benefit reasons when granting a guarantee or security, although it is advisable to do so based on the characteristics of a specific transaction, or to ensure the effectiveness of the security or guarantee if the grantor becomes insolvent. These formalities have the main aim of avoiding any presumption of gratuity in an insolvency scenario that could challenge the validity of such guarantees and activate any potential clawback claim from third-party debtors. The Spanish Supreme Court, in a ruling of 2014, highlighted the importance of ensuring that the guarantor receives any direct of indirect benefit for the provision of the guarantee.

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

All directors should act when conducting business with the diligence of an "orderly entrepreneur". Moreover, any individual forming part of a management body should generally comply with the various duties foreseen in the applicable law, the articles of association and other internal rules with due care, abiding by the shareholders' decisions and following standard market criteria that enhance the performance and growth of the business. Furthermore, all directors should avoid any situation when a potential conflict of interest may arise in the performance of their duties and shall refrain from adopting decisions when they can reasonably foresee that such decisions may have a negative impact on the business.

This last duty is inextricably linked with any potential liability toward them when adopting the decision to secure borrowings from a different member of the group. In an eventual insolvency scenario, there is a potential risk that the insolvency administrators might presume that the granting of collateral by the company could have resulted in the insolvency and allege that it is detrimental to the insolvency estate. In these situations, it is paramount to follow the guidelines established in question 2.1 above as well as to include certain limitation language in the collateral documentation and in the corporate resolutions, to mitigate any potential liability.

The existence of a detriment to the estate of the guaranteeing company can be challenged by evidencing that there is a regular trend of providing borrowing and guarantees among companies belonging to the same group or by attesting that the guarantee entailed some economic advantage to the guarantor.

2.3 Is lack of corporate power an issue?

Yes, in Spain the agreements need to be executed by duly empowered representatives of the company with sufficient corporate power to act on its behalf.

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

Usually, no governmental consents or filings are required to grant guarantees or security interests in Spain (see question 3.11 below) unless the company falls under the scope of any public regulation or is directly or indirectly governed by any public authority, where the adoption of such actions can be limited or subject to further formalities and consents.

Regarding internal corporate approvals, in general terms, any actions or activities which fall within the scope of the corporate purpose of the company are subject to fewer formalities. However, in case of private limited liability companies (*sociedades de responsabilidad limitada*), the shareholders' approval may need to be obtained before carrying out certain transactions. In public limited liability companies (*sociedades anónimas*), despite not being mandatory, the shareholders' approval is also usually obtained (see question 2.1 above for more information on corporate benefit).

If the amount of the guarantee represents an excess of 25% of the value of the assets which appear in the latest balance sheet of the company – having the consideration of an "essential asset" as per the Spanish Companies Act – it is also mandatory to obtain the shareholders' approval as the shareholders' meeting (not the board) holds exclusive competence to adopt any decision involving the disposal of assets exceeding such threshold. The aim of this regulation is: (i) to reserve for the shareholders the approval of certain transactions which, due to their financial significance, can have similar effects to those of a structural modification, even though, from a technical perspective, they do not constitute such kind of transaction; and (ii) to protect the minority shareholders.

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

No, although certain limitation language is included in case of a disproportionate benefit between the borrowing company and the guaranteeing/securing company (see question 2.2 above for more information).

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

There are no exchange control regulations on the enforcement of a guarantee. However, Spanish Insolvency Law imposes an important restriction on lenders facing imminent or real insolvency of its debtors, as any termination clauses solely based on insolvency of the debtor which may have been included by the parties in an agreement are deemed non-applicable or non-enforceable.

3 Collateral Security

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

The most commonly used types of collateral in the framework of a financing transaction are generally classified into two main groups: (1) *in rem* security interests, the most frequent being: (i) mortgage over real estate (*hipoteca inmobiliaria*); (ii) ordinary pledge over movable assets with transfer of possession (*prenda ordinaria*) (e.g., pledge over shares, over credit rights or over bank accounts); (iii) chattel mortgage (*hipoteca mobiliaria*) over business premises, aircraft, machinery or equipment; and (iv) non-possessory pledge over assets (*prenda sin desplazamiento de la posesión*); and (2) personal guarantees, mainly being first demand guarantees (*garantías a primer requerimiento*) or sureties (*avales*).

The main difference between *in rem* security interests and personal guarantees is that, in the former, a specific asset secures fulfilment of the obligation, while in the latter, an individual or corporate entity guarantees fulfilment of the obligation. The collateral value of the *in rem* security is linked to the value of the underlying secured asset, while the value of the personal guarantees relies on the estate of the guarantor considered as a whole. As briefly highlighted below, there are also material differences in proceedings for their treatment and enforcement during insolvency (*concurso*) under the Spanish Insolvency Act (*Ley Concursal*).

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

Spanish law does not provide for a so-called "universal security" over the global debtor's assets. Therefore, traditionally, a security agreement is usually required in relation to each type of asset. Nor does it generally admit the creation of a "floating" lien or encumbrance (i.e., a variable guarantee over assets) except for certain mortgages over real estate (*hipoteca flotante*) and some analogous figures that enable the creation of security over several assets such as the pledge over inventory or the pledge over furniture, fixtures and equipment (FF&E), generally used in real estate transactions. As a basic premise, it is paramount to flag that only financial entities (and not investment funds) and certain public administrations holding tax credits against the debtor can be beneficiaries of the so-called floating mortgage (*hipoteca flotante*) that allows security over different obligations under a single umbrella agreement.

The creation of guarantees and security interests requires the notarisation of the agreements by means of which they are granted. Such notarisation allows the agreements to qualify as executive title (*título ejecutivo*) in an enforcement scenario, pursuant to article 517 of the Spanish Law on Civil Procedure. Notarial deeds (being either *pólizas notariales* or *escrituras públicas*) provide certainty of the date and content of the applicable document *vis-à-vis* third parties. Furthermore, some of these types of security interests are subject to compulsory entry on public registries, such as the Land Registry (*Registro de la Propiedad*) (e.g., real estate mortgage) or the Chattel Registry (*Registro de Bienes Muebles*) (e.g., mortgage on inventory or non-possessory pledge over assets), while such registration is not required for other collateral (e.g., ordinary pledge with transfer of possession).

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

Real property is taken as security by means of a real estate mortgage (*hipoteca inmobiliaria*). Under Spanish law, real estate mortgages cover: (i) the plot of land and the buildings built on it; (ii) the proceeds from any insurance policies covering such property; and (iii) the improvement works carried out on the property and natural accretions. Should the parties agree to it and convey it on the relevant deed by means of which the mortgage is formalised, such mortgage may also include movable items located permanently in the mortgaged property.

Security over machinery and equipment may be created by means of a chattel mortgage (*hipoteca de maquinaria industrial*) or a non-possessory pledge (*prenda sin desplazamiento de maquinaria industrial*). The choice will depend on whether the specific asset meets certain legal requirements.

Further formalities for the abovementioned security (other than notarisation of the security agreement as set forth under question 3.2 above) involve the registration of such security with the corresponding Spanish registries: the Property Registry (*Registro de la Propiedad*) with regard to the mortgages, and the Chattel Registry (*Registro de Bienes Muebles*) with regard to the non-possessory pledge. Registration within the Property Registry is mandatory for mortgages; the mortgage does not formally exist until it is recorded in the Property Registry corresponding to the domain where the plot is located.

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

Security over receivables can be taken in two different manners: (i) by creating a possessory pledge (*prenda ordinaria*); or (ii) by creating a non-possessory pledge (*prenda sin desplazamiento de la posesión*) which needs to be registered in the Chattel Registry.

With regard to the possessory pledge over receivables, it is necessary to notify the assigned debtor in order to avoid the application of any set-off or release of the payment obligations of such assigned debtor by way of payment to the security provider.

The non-possessory pledge (*prenda sin desplazamiento de la posesión*) does not require notification to the relevant debtor, since publicity *vis-à-vis* third parties is obtained through the filing of such pledge with the relevant Chattel Registry.

Further to the above, those claims which are secured by a pledge over future receivables shall be considered "specially privileged" in an insolvency proceeding, so long as the following requirements are met: (i) the security interest granted is documented by means of a public deed (*escritura pública*) when it comes to ordinary pledges; or (ii) the security interest is formalised by means of a deed (*póliza notarial*) and is registered in the relevant Chattel Registry in case of a non-possessory pledge. Specially privileged credits will be settled by way of resorting to the pledged assets and will not benefit the remaining creditors of the insolvent debtor until and only until the credit of the secured party is fully settled.

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

The pledge over bank accounts is simply a pledge over the receivables arising in favour of the holder of a bank account *vis-à-vis* the bank, which should typically correspond or be equal to the account balance.

The formal requirements that apply are identical to those of any other possessory pledge over receivables. The creation of the pledge does not imply, unless otherwise agreed by the parties (typically in project finance transactions when special accounts are envisioned to control cash flows), the blocking of the amounts deposited in such bank account, although some reservations as to how the balance may be disposed by the debtor are typically included in the security agreement.

On a separate note, in the event of pledges over bank accounts securing cash settlements of financial instruments (such as netting-based financial agreements), it is possible to subject the pledge to a specific regime regulated under Royal Decree 5/2005, which enables the secured party to perform the direct sale (without following court or out-of-court enforcement proceedings) of the balance deposited in such account in case an event of default occurs.

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

Yes, it is certainly possible, and it is one of the most common and frequent types of security in Spanish financing transactions.

If the shares to be pledged belong to a private limited company (*sociedad limitada*), and taking into account that quota units (*participaciones*) are not represented by issued certificates (contrary to shares (*acciones*) of public limited companies (*sociedad anónima*)), possession is transferred by means of the execution of a notarial deed of pledge and the registration of the pledge in the Registry Book of Shareholders (*Libro Registro de Socios*) of the relevant pledged company. It is customary that the granting of the pledge is also recorded in the title of ownership to further attest the granting of such collateral and prevent further liens or encumbrances over such asset.

When the shares belong to a public limited company (*sociedad anónima*), transfer of possession is achieved as follows: (i) if the share certificates (*títulos múltiples* or *resguardos provisionales*) have been issued, by endorsing the relevant title certificate and registering the pledge in the Registry Book of Shares (*Libro Registro de Acciones*); or (ii) if no share certificates have been issued, by means of the registration of the pledge in the Registry Book of Shares.

In both cases, it is also advisable (and standard market practice) for the pledgee to request and obtain a certificate issued by the company's secretary representing that the pledge has been registered in the Registry Book of Shareholders or the Registry Book of Shares (as applicable), which will also comply with the requirement of notifying the pledge to the company whose shares are being pledged. Also, such kind of certificate normally includes several representations of the company such as the absence of previous liens or encumbrances over such shares.

When the pledged company's shares are represented by means of book entries (*anotaciones en cuenta*), the pledge must be registered in the relevant account, becoming enforceable against third parties once registered in the registry book. In the case of shares traded on a Spanish secondary market, the registry book will be held by a central clearing house. On request, the entity responsible for the registry book will issue a certificate stating that the pledge has been entered.

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

Yes, Spanish law foresees a specific mechanism for creating security over inventory, which is the non-possessory pledge over inventory (*prenda sin desplazamiento de inventario*). As provided in questions 3.2 and 3.3 above, this type of collateral requires notarisation as well as registration in the relevant Chattel Registry to be perfected. The notarial deed will need to include a very comprehensive description of the inventory for the pledge to be duly recorded in the relevant registry and also the identification of the premises where such inventory will be located throughout the life of the pledge.

However, it is also possible to create a security over inventory by granting a chattel mortgage over a business (*hipoteca de establecimiento mercantil*), which will include not only the inventory, but the whole business.

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

Subject to the financial assistance and the corporate benefit previously explained under question 2.1, as a general rule, the principle of integrity (*principio de especialidad*) (by virtue of which a security interest can secure only one main obligation and its ancillary obligations, such as interest, costs, etc.) must be complied with, which in practice means that when there are two different main obligations which need to be secured, two different security interests (over different assets or portions of the same asset) must be created. However, a certain degree of flexibility is envisioned under Spanish law for those transactions where, despite the existence of several obligations, all of them abide by a clear and single purpose and an inextricable link can be evidenced between them. In these situations, the parties involved in the transaction can resort to certain figures to circumvent the principle of integrity such as the equalisation of rank among the security or the creation of second and subsequent ranks in the security.

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

For possessory pledges to be enforceable *vis-à-vis* third parties, a notarised agreement (*póliza notarial*) or, as the case may be, a deed (*escritura pública*) must be entered into. This is due to the fact that it is presumed that these public documents verify the date and the terms and conditions of the pledge.

Some other types of security are subject to compulsory notarisation and registration on public registries which has certain implications in terms of cost, mainly due to: (i) registration fees, which vary in accordance with the amount of the secured liability (approximately 0.02% of the secured liability); and (ii) stamp duty of 0.5% to 2% of the secured liability (principal, interest and any related costs), depending on the region where the collateral is located. Stamp duty is not levied on ordinary pledges.

Notarial fees are calculated on the basis of fixed criteria, which provide a means to calculate the amount of their fees and which vary in accordance with the amount of the secured liability (approximately 0.03% of the secured liability), although in transactions with an aggregate value over €6,000,000, such fees may be reduced if negotiated with the notary.

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

For security documents that need to be filed within a public registry, the expected elapsed time from the date the documents are notarised to the actual registration by the public registry is usually from two to six weeks. This timeframe is not mandatory by law and therefore largely depends on the public registry and the workload of such registry. Nevertheless, on occasion, public registries consider that necessary amendments need to be made to the relevant security document in order to comply with registration criteria, which may delay registration and increase the previously mentioned term.

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

Regulatory or other consents with respect to the creation of security over real property or machinery would apply only in very limited cases, depending on the exact location of the asset, its nature and the parties involved (e.g. mortgage over administrative concessions, which would require the approval of the relevant administrative body).

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

There are no special priority or other concerns worth noting that arise as a direct consequence of the revolving nature of the financing.

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

As explained in question 3.2 above, in Spain security interests are almost always notarised. To appear before a Spanish notary, all parties must be duly empowered (they can act under powers of attorney, which in case of foreign entities must bear an apostille in accordance with The Hague Convention or a legalisation from the relevant consulate or other competent body). The original power of attorney will need to be provided to the Spanish notary so that due capacity of the authorised representative is duly attested.

Signature in counterparts is not used in Spanish law-governed agreements. It is worth mentioning that all parties that are signatories to a Spanish notarial deed must have a Spanish Tax Identification Number (*Número de Identificación Fiscal* or "NIF"), even for non-resident parties and their non-resident attorneys (either individuals or entities), which must request such number before the Spanish Tax Authorities (*Agencia Tributaria*).

Additionally, the Spanish Anti-Money Laundering Law (*Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo*), requires certain disclosure obligations when executing transactions before a Spanish notary (with certain exceptions, such as those for listed companies or certain financial institutions). In particular, individuals executing a public deed before a notary on behalf of a company need to disclose the identity of the ultimate beneficial owner (*titular real*) of the company, which is:

- the ultimate shareholder or shareholders (individuals) of the company, in the event that a certain person holds (individually), directly or indirectly, a stake exceeding 25% in the share capital of this company; or
- the individual which directly or indirectly controls the management of such company (being understood as control the capacity to name more than half of the members of such management body).

In the event that no individuals hold such a direct or indirect stake or control, the directors/members of the management body of the company are to be regarded as the ultimate beneficial owners and need to be identified too by providing a copy of their passports.

4 Financial Assistance

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

Generally, Spanish law prohibits funds being provided (whether by way of loans, guarantees or any other kind of financial support made available before or after the acquisition) by a target company to a third party so that the third party is able to acquire the target company's shares or quotas, or by any other company in the group to which the target company belongs.

Financial assistance is currently prohibited in Spain for:

(a) *sociedades anónimas* (S.A.) (public limited companies): for their own shares or the shares of any direct or indirect parent company; and

(b) *sociedades de responsabilidad limitada* (S.L.) (private limited companies): for their own units and the units of any member of their corporate group.

This prohibition to give financial assistance includes assistance whether by provision of funds or by way of granting of loans, credits, guarantees, security or otherwise. The legal sanction is the nullity of the agreement and, if fraud can be evidenced, nullity of the agreements for the actual acquisition of the shares.

5 Syndicated Lending/Agency/Trustee/Transfers

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

Spanish law does not recognise trusts as a legal concept. Therefore, security trustees, although used in transactions where foreign lenders are involved, are seldom used for a Spanish security package. Instead, lenders tend to appoint an agent for the Spanish security, which holds the security in its own name and on behalf of the other lenders.

It is possible for a security agent to enforce claims on behalf of the lenders and the other secured parties, as long as each party grants a notarised power of attorney in favour of the security agent. Such power of attorney must expressly authorise the security agent to carry out the enforcement proceedings on behalf of the lenders.

This system nevertheless has two issues: from a practical perspective: (i) Spanish banks are reluctant to grant powers of attorney to other banks, and prefer to appear themselves throughout the enforcement proceedings; and (ii) from a legal perspective, authors and case law are inconsistent regarding the role of an agent acting on behalf of a syndicate of lenders upon enforcement.

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

As stated in question 5.1 above, the appointment of an agent for Spanish security is usual market practice for cross-border financings. The capacity of the agent to act on behalf of the rest of the parties will be evidenced by means of the due empowerment complying with all the relevant formalities.

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

Debt is traded through assignment (*cesión*) in Spain, and due to the accessory nature of security interests under Spanish law, any assignment of a participation in a secured financing agreement would automatically entail the proportional assignment of the security interests granted to secure such assigned debt by virtue of article 1,528 of the Spanish Civil Code.

However, for certain types of collateral (mainly those acceding to registers such as mortgages and non-possessory pledges), in order to be effective against third parties, the assignment of the relevant collateral must be notarised and registered with the relevant public registry.

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

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

In general, interest that Spanish borrowers pay for loans made to domestic lenders (other than financial institutions and securitisation funds) is subject to 19% withholding tax in 2022. Likewise, interest income payable on loans made to non-EU tax residents is subject to 19% withholding tax, unless a lower rate applies under a tax treaty (treaty rates range between 0% and 15%) provided that the foreign treaty lender is the "beneficial owner" of the interest. Interest payments to EU/EEA residents and EU/EEA permanent establishments (except those residing in tax-haven jurisdictions) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a company) provided that the EU/EEA lender is the "beneficial owner" of the interest (please refer to the recent ECJ judgments, of 26 February 2019, on the Danish cases and their impact on the concept of "beneficial ownership", as they provide guidance on the interpretation of this concept).

Since 2012, under the Spanish Corporate Income Tax Act, there have been some limitations to the deductibility of financial expenses:

(a) Financial expenses derived from intergroup (under Section 42 of the Spanish Commercial Code) indebtedness are not tax-deductible if the funds are used to make capital contributions to other corporate group entities, or to acquire from other corporate group entities shares in other entities, unless the taxpayer proves there are valid economic reasons for doing so.

(b) Additionally, interest paid for leveraged buy-out share acquisitions, where within four years following the acquisition, the acquired entity is included in the tax group of the acquirer or is merged with acquirer, is not tax-deductible unless the following requirements are met:
  - Indebtedness must be lower than 70% of the purchase price.
  - Indebtedness will be reduced proportionally in the eight years following the transaction by up to 30% of the mentioned price.

(c) Net financial expenses (financial expenses minus financial income) exceeding 30% of the operating profit for the financial year are not tax-deductible, with a minimum deductible amount of €1 million guaranteed. Net financial expenses that, by applying the 30% limit, are not tax-deductible, may be deductible in the following financial years without a time limitation. If the 30% limit is not reached, the difference may increase the applicable limit for the following five financial years.

(d) Interests paid on participative loans granted by another company, which is part of the same group of companies under Section 42 of the Spanish Commercial Code, are not tax-deductible.

(e) For tax periods not ending by 11 March 2021, Spain applies hybrid mismatch rules as per the implementation of ATAD 2 into Spanish law (except for reverse hybrid mismatches). The purpose of the rules is to neutralise the tax effects of hybrid mismatches by limiting the tax deduction of certain payments and by including certain other payments in the taxable income of a Spanish company.

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

Spain currently has more than 90 income tax treaties in force and a broad treaty network with Latin American countries that reduce or eliminate Spanish taxes payable to residents of treaty countries. In this sense, on 7 July 2017, Spain signed the OECD multilateral instrument, which was ratified on 28 September 2021 and entered into force on 1 January 2022, which modifies a large number of existing bilateral tax treaties by including anti-tax avoidance measures developed in the BEPS project.

These provisions could affect the tax treatment of interests paid by Spanish borrowers to foreign lenders, but a case-by-case analysis should be carried out.

The main tax incentive is the Spanish international holding companies ("ETVEs") regime, a well-established legal framework that has helped Spain become one of the most favourable jurisdictions in the EU to channel and manage international investments. ETVEs can benefit from a 95% exemption on inbound dividends and capital gains and a full exemption on outbound dividends and capital gains provided several requirements are met. Since ETVEs are Spanish regular entities, they are treated like regular limited liability companies, thus benefitting from tax treaties signed by Spain and from EU Directives.

Under Spanish law, no relevant additional taxes apply to foreign investors besides those applicable to Spanish investors.

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

In general terms, lending or the granting of a security by a foreign lender to a Spanish company would not create a taxable presence (i.e. a permanent establishment) in Spain for a foreign lender.

Under current Spanish Corporate Income Tax regulations, interest paid to the lenders will not be subject to any withholding or deduction, provided that the lenders are lending entities or financial credit establishments entered on the special registries of the Bank of Spain and have their registered office in Spain, or entities resident in the European Union that have submitted certification of their tax residence provided that they are the "beneficial owners" of the interest (the "beneficial ownership" concept should be analysed in light of the criteria provided by the recent ECJ judgments on the Danish cases).

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

To be able to enforce any rights regarding third parties and benefit from summary proceedings (see question 7.3 below), a loan, a guarantee or a security document must be notarised and eventually registered (depending on the asset).

For more detailed information on notarial and registry fees and stamp duty tax, please see question 3.9 above.

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

Most tax consequences do not differ as a result of the tax residency of the lender. Exceptionally, adverse tax consequences (documentation obligations and other anti-abuse measures) might arise when the lender is tax resident in a tax haven jurisdiction.

7 Judicial Enforcement

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

Yes, courts in Spain recognise foreign governing law in contracts in line with Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Regulation Rome I").

Regulation Rome I has *erga omnes* effects. Hence, whatever it is, the foreign law chosen to govern a contract is enforceable, irrespective of whether or not it is an EU Member State.

Spanish Courts will certainly recognise a contract governed by foreign law; however, the choice of the parties will not avoid the application of *ius cogens* provisions of Spanish law that cannot be derogated by private agreement (public policy) between the parties such as those relating to consumers' interests, labour law and insurance or distribution contracts. Also, the content and validity of foreign law must be proved in the proceedings; if the foreign law is not proved, the court will resort to Spanish laws.

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

The following distinctions must be made: (i) judgments rendered by NY courts; (ii) judgments rendered by EU Member States' courts; and (iii) judgments rendered by UK courts.

First, regarding judgments by NY courts, Regulation Brussels I recast does not apply. In the absence of a multilateral or bilateral treaty between Spain and the United States addressing the matter, under Spanish Act 29/2015, on International Cooperation, final judgments rendered by US courts will have the same force as given in the US provided that they comply with the requirements for its recognition set forth in article 46 of the Act on International Cooperation (*inter alia*, the judgment does not infringe Spanish public policy, the defendant has been properly served with the originating process, the matter is not subject to Spanish exclusive jurisdiction for certain matters, or is not in contradiction with a previous Spanish judgment). Once the exequatur is granted, the judgment can be enforced according to the rules set forth in the Spanish Civil Procedure Act.

Second, regarding judgments by EU Member States' courts, Council Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation Brussels I recast"), establishes that a judgment rendered in an EU Member State is to be recognised without special proceedings in any other EU Member State, unless the recognition is contested. Under no circumstances can the merits of a foreign judgment be reviewed. A declaration that a foreign judgment is enforceable is to be issued following purely formal checks of the documents supplied.

However, a judgment will not be recognised if: (i) the recognition is manifestly contrary to public policy in the EU Member State in which recognition is sought; (ii) the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his defence; (iii) it is irreconcilable with a judgment given in a dispute between the same parties in the EU Member State in which recognition is sought; (iv) it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties; or (v) the judgment was adjudicated by a court lacking jurisdiction in case of exclusive jurisdiction.

Third, regarding judgments by UK courts, Regulation Brussels I recast (described above) applies to the enforcement of judgments rendered in proceedings brought before 31 December 2020 (Article 67(2) of the Brexit Withdrawal Agreement). For other judgments, currently the Hague Convention 2005 applies to the recognition and enforcement of UK judgments provided that the Convention's scope of application is met. We note that this scope excludes a number of subject matters in its Article 2(2) (including, without limitation, insolvency matters, wills and succession, family matters, claims for personal injury, carriage of passengers and goods, rights *in rem* in immovable property) and only covers judgments given by courts designated in an exclusive choice of court agreement.

Provided the Convention's requirements are met, the requested court shall not review the merits of the judgment and the grounds for refusal of recognition are limited in Article 9 of the Hague Convention: (i) agreement null and void; (ii) lack of capacity of a party; (iii) procedural irregularities (lack of notice); (iv) judgment obtained by fraud in connection with a matter of procedure; (v) incompatibility with public policy of the requested state; (vi) inconsistency with a judgment given in the requested state between the same parties; or (vii) inconsistency with an earlier judgment given in another state between the same parties and on the same cause of action.

Where the Hague Convention 2005 does not apply, enforcement may be requested in Spain based on the provisions of the Spanish Act on International Cooperation (addressed above).

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

This depends primarily on whether the enforcement action is grounded on an executive title, such as public instruments (i.e. a public deed), or on an ordinary title, such as private contracts:

(a) Executive titles can be enforced directly, through summary proceedings, which consist of a swift procedure that should take between nine and 18 months. Otherwise, the so-called ordinary proceedings, which inevitably lead to a decision which should be enforced through an enforcement proceeding, may take on average between 12 and 18 months plus the nine to 18 months of the enforcement proceeding.

(b) Enforcement of a UK court decision under the Hague Convention 2005 would require a previous (specific) exequatur procedure that would normally take between five and eight months. For UK court decisions outside of the Hague Convention 2005 scope, ordinary prior exequatur proceedings are required, which takes on average between seven and 10 months. Once the judgment has been recognised, enforcement will follow the same proceeding as explained in point (a) above. For NY court decisions, the same ordinary prior exequatur proceedings (seven to 10 months) followed by the same proceeding outlined in (a) would apply.

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

Enforcement of collateral security is typically carried out through a public auction (by means of an online auction), in the context of judicial or notarial proceedings. For notarial enforcements, see question 8.4 below. Additionally, the enforcement of pledges over credit rights may also be achieved through set-off or assignment of claims.

The rights derived from the relevant security can be judicially enforced either through declaratory civil proceedings or summary proceedings. The latter action is faster and more effective, while the former is costly and time-consuming. However, to start summary proceedings, certain requirements must be met, particularly the determination of the due and payable amount in accordance with the Civil Procedure Act.

Once the court has published a date for auction, the debtor will only be able to object under limited circumstances, such as the prior extinction of the pledge, full payment of the secured obligation, the existence of a material mistake or the existence of abusive clauses.

Concerning the enforcement of pledges over shares, the Financial Collateral Directive was transposed in Spain by means of Royal Decree Law 5/2005, which sets forth a speedy proceeding that applies to obligations of a "financial" nature and which permits direct appropriation of the collateral by the creditor where the financial agreement expressly states so.

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

Generally, there is no distinction between domestic and foreign entities when it comes to foreclosing on Spanish securities.

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

Bankruptcy declaration triggers an automatic stay of one year (unless the debtor gets the approval of a composition agreement or files for liquidation earlier). This automatic stay concerns secured creditors with collateral over assets that are necessary to continue the ordinary course (except security interests subject to the special regime on financial collateral). Exceptionally, the above standstill period will not apply if the insolvency judge determines that the assets which constitute the object of security are not devoted to the business activity of the insolvent company, do not constitute a productive unit of such company or, eventually, such asset is not necessary for the continuation of the business operations.

During the stay, the bankruptcy officer may decide to treat the secured claim as an administrative expense (pre-deductible claims from the estate) in order to avert enforcement of the security interest.

This automatic stay can also apply if the debtor serves an article 583 notice, which enables the debtor to negotiate an out-of-court solution to financial distress in a four-month period. The stay of enforcement actions, which does not apply to public claims, lasts for a three- or four-month period (there are different criteria) and concerns assets that are necessary to continue the ordinary course. Yet any enforcement action conducted by holders of financial claims may be stayed if the debtor obtains a standstill supported by 51% of the financial claims. Security interests subject to the special regime on financial collateral escape this automatic stay in any event.

Lastly, if the secured creditor fails to enforce the security interest prior to liquidation (or reinitiate the formerly stayed enforcement proceeding as a result of bankruptcy declaration), it may lose control over the collateral if the liquidation plan sets forth the sale of the business unit as a going concern. In exchange for losing control to enforce the security interest on a stand-alone basis, secured creditors obtain a portion of the price equivalent to the weight of the collateral in the estate. If that percentage of the price is less than the value recognised in the proceeding for the security interest, secured lenders that did initiate the enforcement proceeding prior to bankruptcy declaration, but did not reinitiate it after the one-year automatic stay, have a veto right as to the approval of the liquidation plan, unless 75% in value of the secured claims from the same class (financial, labour, public, commercial) were to consent to it.

Lastly, the Civil Procedure Act provides that a moratorium on enforcement on the grounds of criminal procedure may halt the enforcement and performance of such agreements until the criminal court issues a final resolution in such proceedings.

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

Yes, Spain has been a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") since 1977, and it is therefore subject to recognition and enforcement of foreign arbitral awards in the terms established therein.

Given that Spain has not presented any reservations to the New York Convention, its proceedings are applied to the enforcement of all arbitral awards, including those rendered in countries that did not sign the convention. The Spanish Arbitration Act specifically establishes that the exequatur of foreign awards will be governed by: (i) the New York Convention, without prejudice to the provisions of other, more favourable international treaties on the granting of foreign awards; and (ii) the proceedings established in the civil procedural system for judgments handed down by foreign courts.

Spanish courts will not re-examine the merits of the case. However, an arbitral award might not be recognised if certain requirements are not met (e.g. the arbitration agreement is not valid, irregularity in the composition of the arbitration authority or in the arbitral procedure, etc.). Furthermore, an award will not be recognised if the subject matter cannot be settled by arbitration in Spain or the recognition is contrary to the public policy of Spain.

8 Bankruptcy Proceedings

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

Bankruptcy declaration triggers an automatic stay of one year (unless the debtor gets the approval of a composition agreement or files for liquidation earlier). This automatic stay concerns secured creditors with collateral over assets that are necessary to continue the ordinary course of business (except security interests subject to the special regime on financial collateral or relating to collateral located outside of Spain).

During the stay, the bankruptcy officer may decide to treat the secured claim as an administrative expense (pre-deductible claims from the estate) in order to avert enforcement of the security interest.

This automatic stay can also apply if the debtor serves a "583.1" notice, which enables the debtor to negotiate an out-of-court solution to financial distress in a four-month period. The stay of enforcement actions lasts for a three- or four-month period (there are different criteria) and concerns assets that are necessary to continue the ordinary course. Yet any enforcement action conducted by holders of financial claims may be stayed if the debtor obtains a standstill supported by 51% of the financial claims. Security interests, subject to the special regime on financial collateral, escape this automatic stay in any event. Besides, public claims cannot be affected in any way by a "583.1" notice.

Lastly, if the secured creditor fails to enforce prior to liquidation, it may lose control over the collateral concerning business units sales, in which case it would get a portion of the price equivalent to the weight of the collateral in the estate. Even secured creditors having enforced prior to liquidation may lose control over the collateral within the framework of business units sales, provided they receive a percentage of the price equivalent to the security interest value as recognised in the bankruptcy proceeding (otherwise, individual consent would be needed unless 75% of the secured claims from the same class sign off). The claim comprising the difference between the resulting price and the value of the secured claim (the deficiency claim) will be classified as unsecured.

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

Pursuant to compulsory priority rules, claims are divided into privileged, ordinary, and subordinated. Privileged claims, which are in turn divided into special privileged (secured) claims and general privileged claims (such as certain torts, tax, social security and employees' claims), are given preferential treatment over ordinary claims, which in turn have preference over subordinated claims. A controlling principle is the equal treatment of creditors from the same class.

Administrative expenses (*créditos contra la masa*) have a cash flow privilege over claims (*créditos concursales*). In contrast to administrative expenses, claims can only be settled pursuant to a plan of reorganisation or with the proceeds arising out of liquidation (either piecemeal or, preferably, as a going concern business). Having said that, secured creditors may auction or repossess the collateral to apply the proceeds thereof to settle their claims (over which administrative expenses have no priority).

Acts or transactions beyond the ordinary course of business entered into within two years prior to bankruptcy declaration may be subject to clawback, so long as: (i) the debtor does not receive reasonably equivalent value in exchange; or (ii) certain creditors are preferred to others when the company is currently insolvent (i.e. unable to regularly pay its debts as they come due). The hardening period in both cases is two years.

The law sets forth certain rebuttable and non-rebuttable presumptions of transactions that are detrimental to the estate. There are also certain safe harbours (namely acts and transactions done within the ordinary course of business, and certain ring-fenced out-of-court solutions).

Actual intent or fraud is not required to bring a clawback action successfully. Yet, in case of actual fraud the reach-back period is four years (and the action can be brought both within and aside from an insolvency proceeding). Moreover, fraud is a requirement to claw back security interests subject to the special regime on financial collateral.

Concerning acts or transactions subject to foreign law, the defendant may thwart the clawback action by proving that such act or transaction is ring-fenced under applicable law.

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

Governmental entities of any type (whether territorially based – such as national, regional, municipal authorities – or of a functional nature) are excluded from bankruptcy proceedings. However, companies directly or indirectly controlled by governmental entities are subject to general bankruptcy law.

Additionally, certain types of companies (such as insurance companies) are subject to specific insolvency regulations, although the composition, appointment and operation of the insolvency administration will still be regulated by general bankruptcy law.

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

Yes, out-of-court enforcement proceedings, available for certain types of security, are typically carried out by a Notary Public and take the form of a public auction. The terms and conditions of such auction are not entirely regulated in the law and hence they usually follow the provisions agreed by the parties in the relevant security documents. Absent a specific agreement, the Notary Public also tends to follow equivalent provisions applicable to judicial enforcements.

In the case of security over bank accounts or listed securities, particularly when the secured obligation consists of cash settlement agreements or derivative contracts, secured lenders may directly and immediately appropriate the secured assets (or offset them), without conducting a public auction. Equally, certain regional laws (such as Catalonian law) expressly permit either private sales or, in the case of highly liquid security, appropriation by set-off.

9 Jurisdiction and Waiver of Immunity

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

The submission by the parties of an agreement to a foreign jurisdiction is valid, binding and enforceable in Spain:

(i) in the case of submission to the courts of an EU Member State: in accordance with the provisions on *prorogation of jurisdiction* contained in Regulation Brussels I recast (*supra* question 7.2), except in cases where the rules on exclusive jurisdiction of the Regulation are to be applied (in general, concerned with proceedings referred to: (a) *in rem* rights or tenancies in immovable property; (b) the validity of the constitution, nullity or dissolution of companies or other legal persons, or the validity of the decisions of their organs; (c) the validity of entries in public registers; (d) the registration of patents, trademarks, designs or other similar rights subject to deposit or registration; and (e) the enforcement of judgments);

(ii) in the case of submission to non-EU foreign courts covered by existing conventions in force in Spain: in accordance with the applicable international bilateral conventions (*ad ex.* Hague Convention of 30 June 2005 on Choice of Court Agreements currently applicable to exclusive choice-of-court agreements designating UK courts); and

(iii) in the case of submission to foreign courts not covered by conventions: in accordance with the Spanish Organic Law of the Judiciary, such submission would be valid, unless the exclusive jurisdiction of the Spanish courts is violated (in general, the same cases described *supra* in (i) (a) to (e), with regard to Regulation Brussels I recast).

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

Under Spanish law, the waiver of sovereign immunity (either of jurisdiction or of execution) by a foreign state is legally valid and enforceable. The waiver may be explicit (by means of an international agreement, a written contract or a declaration, or a written communication made within the proceedings to the relevant tribunal) or tacit (as a result of certain acts on the side of the foreign state), in accordance with Spanish Organic Law 16/2015 of 27 October 2015.

Absent the waiver of sovereign immunity, no asset owned or controlled by a foreign state and allocated to public and official (i.e., non-commercial) purposes can be seized or subject to enforcement proceedings in Spain. This includes assets: (a) used by the diplomatic missions or consular offices of the foreign state for the performance of their duties and functions (including bank accounts, with the exception of accounts exclusively used for commercial purposes); (b) used for military purposes; (c) of the central bank or similar monetary authority of the foreign state and used for the performance of their duties and functions; (d) forming part of the foreign state's cultural heritage or with scientific, cultural or historical interest (with the exception of assets offered for sale); and (e) official vessels and airships, exclusively attached to public services of a non-commercial nature.

10 Licensing

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

There is no need for foreign or local lenders or agents under a syndicated facility to be resident, licensed, qualified or entitled to do business in Spain to execute or enforce any rights in Spain under any financing agreements or collateral agreements, provided that, in the case of foreign lenders (and where and if applicable), they are licensed, qualified or entitled to do business in their own jurisdiction of incorporation. Consequently, there is no material distinction between domestic and foreign creditors for the purposes of granting loans or security. Nevertheless, foreign lenders are still subject to some of the abovementioned formalities, such as the obligation to obtain a Spanish tax identification number (NIF) (as explained in question 3.13 above).

11 LIBOR Replacement

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

The National Securities Market Commission ("CNMV") is the competent authority in Spain for the application of the regulation on benchmarks. In this regard, the CNMV has released a set of recommendations which includes, among others: (i) the identification and evaluation of risks and possible impacts resulting from their exposure; (ii) the design of a global strategy to plan the corresponding implementation steps; and (iii) the need for an adequate organisational structure to coordinate the design and implementation of the transition work. In addition, the CNMV has also stressed the importance of taking into consideration the global transition roadmap of the Financial Stability Board (FSB), which is aimed at raising awareness of the steps that financial and non-financial firms must take to successfully transition away from LIBOR.

Furthermore, the CNMV recommended that all market participants should ensure that robust fallback language is used in all contracts. In this respect, the CNMV values the protocol and supplement of ISDA (the International Swaps and Derivatives

Association) on fallback clauses in derivative contracts referenced to benchmarks such as LIBOR, and advises Spanish financial institutions, companies and public administrations to consider the value of adhering to this protocol.

Aside from CMNV's several recommendations as regards the cessation of LIBOR as a benchmark, it is worth mentioning that the substitute reference rate for LIBOR most frequently used in Spain is the SOFR (Secured Overnight Funding Rate), or failing that, the "Central Bank Rate", being the Central Bank Rate of the NYFED. In relation to cross-border financings particularly, the recommendations of the Loan Market Association (LMA) are applied.

12 Other Matters

12.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2021 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020/2021 due to COVID-19 to continue into 2022 and beyond?

Document execution and delivery requirements were not affected by COVID-19 during 2021, and we do not foresee substantial amendments to the execution process and formalities in the coming months.

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

Most of the relevant issues have already been covered in the previous questions. However, we take the opportunity to point out that the Spanish Companies Act sets out the conditions under which a Spanish company (whether in the form of a public limited liability company (*sociedad anónima*) or in the form of a private limited liability company (*sociedad de responsabilidad limitada*)) may issue and guarantee debt securities.

Because of recent amendments to such law, limited liability companies are now allowed (as opposed to the previous regulations in this regard) to issue and guarantee bonds and other securities that create or recognise debt, except for convertible instruments (i.e., securities which can be converted into equity).

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