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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

Despite the stagnation shown by the latest macroeconomic data in Europe, Spain has a growth projection of around 3%. The strengthening of the Spanish banking system – a consequence of the latest regulations due to the financial crisis – and a lower impact of the global trade war are two key factors that have enabled the Spanish economy to grow faster than its neighbours. However, observers cannot ignore the impact that a hard Brexit, a serious complication of the trade war, and internal political instability may have in the near future. In terms of loans, the overall low level of interest rates has enabled traditional loans to be the main source of funding for most Spanish companies. However, the new banking framework resulting from the financial crisis has

introduced several measures that have changed the financial structures, including new limits, levels of provision, and controls. Due to these restrictions, banks are becoming more rigid and are establishing greater control and supervision requirements over financing. Moreover, new trends such as term loans B (TLBs), high-yield bonds, securitisation as an exit strategy for non-performing loans, and direct lending are a real threat to traditional lending.

Nonetheless, the Spanish legislator has carried out a significant task to promote capital markets as an alternative source of finance. Furthermore, it is fundamental to remember that lending is not a reserved banking activity in Spain. This flexibility has provided an opportunity to new players, including non-traditional lenders, who are becoming a fundamental part in many financing structures.

Even so, the features of the Spanish business landscape, including small- and medium-sized enterprises (SMEs) of a family nature, make traditional lending the fundamental source of finance.

1.2 The High-yield Market

Over the last five years, high-yield issuance by Spanish groups has been fairly steady, at approximately five issuances per year (not counting multiple tranches issued by the same issuer on the same date). Many of these deals involve repeat issuers (or related group companies of existing issuers) whose covenant terms and financing structures are subject to only incremental changes over time. As such, the high-yield market has not played a significant direct role in the emerging trends within the broader banking and finance market in Spain, other than in the very general sense of loan agreements trending towards adopting high-yield incurrence-based covenants.

1.3 Alternative Credit Providers

Although Spanish banks have benefited from Spain's economic recovery, and from easy access to liquidity, the traditional banking business is being threatened by increasing regulations, low interest rates, and the emergence of non-traditional lenders.

Since neither a licence nor an authorisation is required to grant loans and credit to companies, debt funds and different types of investment funds are becoming a viable alternative to traditional banks. Generally, these institutions are more flexible and more likely to grant a loan without the borrower having to meet the requirements generally demanded by traditional banks. Additionally, the procedure for obtaining funds from these "shadow banks" is more efficient than the traditional banks procedure, so debt funds do not have to comply with all the formalities required by commercial banks. The flexibility of these new players is based on their business model: the way in which they obtain profitability allows them to lend on a long-term basis, and therefore borrowers are more likely to negotiate bespoke terms and structures for their loans.

1.4 Banking and Finance Techniques

Since the financial crisis, companies have grown and invested in new projects, including those related to sustainability and ethical impact. Accordingly, the market has seen the first green bond issuances and other traditional lends with a special attachment to sustainable projects.

In connection with the United Nations' Sustainable Development Goals (SDGs) and other sustainable initiatives, the latest market trends relate to social and environmental projects, and institutional investors are including environmental, social and governance (ESG) criteria in their investment strategies. All of this creates an opportunity for companies to finance their sustainable projects with bond issuances. The

energy company Enel, for example, successfully launched the world's first "general purpose SDG linked bond" on the US market. Meanwhile, traditional bank loans are also starting to link their funding to the company's performance in terms of sustainability. Another example in the Spanish market is the syndicated loan given to Acciona, which is linked to the company's performance in terms of ESG.

1.5 Legal, Tax, Regulatory or Other Developments

Legislative activity in Spain has been quiet of late due to the political climate.

From a tax perspective, there have been certain legislative and case law developments over the past 12 months that are bound to affect the Spanish loan market. First, following the Supreme Court's ruling confirming the long-standing interpretation that the party liable for the payment of stamp duties on mortgage-secured loans is the borrower, the Spanish government passed Royal Decree-Law 17/2018 (which came into effect on 10 November 2018), amending the law to shift taxpayer status to the lenders. Such reform applies regardless of the type of loan, the status of the lender (bank or otherwise) or the status of the borrower (eg, consumer, individual, or corporation). From a practical standpoint, however, lenders often still demand that borrowers bear the cost of stamp duties.

Second, the long-awaited new protocol to the US-Spain double tax treaty (signed in 2013) will enter into force in November 2019, and includes a general exemption from withholding tax on Spanish-source interest obtained by US lenders entitled to treaty benefits. The Spanish loan market will likely become more attractive for US lenders, who will be able to claim "treaty lender" status and benefit from market-standard tax gross-up protections.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

In terms of general corporate financing, including all transactional financing, broadly speaking no specific authorisations are needed in order to provide financing in Spain, and lenders can provide financing and take leading roles such as security agent or arrangers without specific permits or authorisations from the Bank of Spain, regardless of whether they are registered financial institutions or are non-financial institutions. However, credit institutions acting for the general public (eg, bank deposits) must be duly registered as such, and are required to obtain regulatory licences or authorisations.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

As provided in 2.1 **Authorisation to Provide Financing to a Company**, there are no general restrictions applicable to foreign lenders.

3.2 Restrictions on Granting Security to Foreign Lenders

The granting of an in rem security interest or guarantee to foreign lenders is generally not restricted or impeded.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no specific restrictions or controls on foreign currency exchange.

3.4 Restrictions on the Borrower's Use of Proceeds

There are no restrictions on the borrower's use of proceeds, as long as they are not used for illegal acts and are in compliance with the limitations agreed under the facilities agreements, if applicable.

3.5 Agent and Trust Concepts

Typically, an in rem security interest in Spain is granted in favour of all secured parties rather than in favour of the security agent, as the concepts of security trustee and parallel debt are not recognised in Spain. Pursuant to Spanish law, an in rem security interest needs to be expressly accepted by the relevant beneficiaries.

3.6 Loan Transfer Mechanisms

The assignment of rights, such as those under loans, is expressly permitted under the Spanish Civil Code. An in rem security interest governed by Spanish law is ancillary to the main obligation it secures, so each time a loan is assigned, the in rem security interest securing that loan is automatically assigned. There are no specific loan transfer or assignment requirements, unless the loan was secured with a registrable in rem security interest (eg, mortgages, in rem security interest over IP rights, or in rem security interest over machinery), which may attract stamp duties.

3.7 Debt Buy-back

Debt buy-back is permitted under Spanish law. However, it should be noted that, in an insolvency scenario, parties related to the insolvent debtor that acquire debt vis-à-vis the latter will be automatically subordinated.

3.8 Public Acquisition Finance

The financing of a takeover bid must be disclosed in the prospectus, detailing the following:

- the type of guarantees and in rem security interest, their amount, and the identity of the financial entities granting them;
- the sources to finance the takeover bid as well as its main characteristics and conditions, including the identity of the financial creditors and the bidder's forecast to attend the service of the debt in the case of an external financing; and
- the effects of the financing on the target company.

Bank guarantees are filed with the Spanish market stock regulator (*Comisión Nacional del Mercado de Valores* – CNMV) and are made available to the public. In contrast, financial documents are not generally made available to the public, although the CNMV can request them for their review and analysis.

4. Tax

4.1 Withholding Tax

As a general rule, interest payments made by a Spanish borrower are subject to a 19% rate tax deduction on account of Corporate Income Tax (CIT) (when the lender is a Spanish resident) or on account of Non-Residents' Income Tax (NRIT) (when the lender is not a Spanish resident).

There are different categories of lenders who may be entitled to an interest withholding exemption under Spanish tax law. Interest paid to Spanish banks (or registered branches of foreign banks) and Spanish securitisation funds are exempt from Spanish CIT withholding. Interest payments received by non-Spanish residents may be exempt from NRIT withholding if a lender is a resident within the EU (lending directly or through an EU-based permanent establishment), or if the lender is a resident in a jurisdiction that has a double tax treaty in force with Spain providing for an exemption on interest payments. Both the EU and the treaty exemptions are subject to the lender evidencing to the borrower (which has withholding agent status) that it is entitled to the NRIT exemption claimed, through the supply of a valid government-issued tax residence certificate. This certificate should be issued by the tax authorities of the lender's jurisdiction of tax residence during the 12 months prior to the date when the relevant interest payment is due or made. Lenders relying on an exemption based on a double tax treaty provision should ensure that their certificates include a reference to their resident status within the meaning of the applicable treaty.

Interest payable in respect of listed bonds issued by a Spanish issuer may be tax-exempt (regardless of the country of tax residence of the bondholder and of the fulfilment of individualised tax certification requirements), pursuant to a special tax regime applicable to qualifying bond offerings. The applicability of such regime should be tested on a case-by-

case basis and will be contingent on the fulfilment of certain requirements relating to, among others, the listing venue and the supply of a payment statement certificate by the paying agent to the issuer on a recurring basis.

Payments of principal are not subject to any withholding tax in Spain. Discount gains derived from the receipt of principal (eg, where the loan was acquired at a discount) are not subject to withholding tax but may eventually be subject to Spanish NRIT if the lender is not able to claim an exemption under an applicable double tax treaty.

The withholding tax treatment of fees received by a lender is not addressed under the Spanish NRIT rules, nor by any precedents issued by the Spanish tax authorities. Market participants generally differentiate among fees that may be more akin to interest (eg, a ticking or commitment fee) and fees that may be more similar to service fees (eg, a structuring fee). Service-type fees may be subject to NRIT withholding unless the recipient is able to evidence its entitlement to an exemption pursuant to the provisions of an applicable double tax treaty.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Loans granted to Spanish borrowers are generally exempt from Value Added Tax (VAT), and are not subject to Transfer Tax. The granting of an in rem security interest in respect of a loan is also exempt from VAT and Transfer Tax (provided that the in rem security interest is granted simultaneously with the loan or its execution is foreseen thereunder).

Stamp duty may be levied on security documents that are executed in the form of a public deed (*escritura pública*) in Spain, provided that the public deed granting the in rem security interest is recorded before a Spanish public registry (eg, a land registry, an IP registry, or a movable property registry). An in rem security interest executed by means of a *póliza* deed does not trigger stamp duty. In general, mortgages (over real estate, chattel or IP) require the execution of an *escritura pública* and trigger stamp duty at rates ranging from 0.5% to 2% (depending on the region of location of the public registry in which the mortgage is eligible to be recorded) over the maximum secured liability under the mortgage.

4.3 Usury Laws

The general principle in Spain with respect to interest is the freedom of contract. However, some laws and regulations have been introduced in order to prevent abusive situations and to protect consumers.

The Spanish Law against Usury, approved in 1908 and known as *Ley Azcárate*, sets out the criteria for a loan to be deemed as a “usury loan” – thereafter, to render the loan null and void. Other legislation that intends to provide protec-

tion for consumers includes Law 7/1998 on general contract conditions, Law 16/2011 on consumer credit agreements, Law 22/2007 on distance marketing of financial services for consumers, and recent Spanish case law on abusive clauses.

According to the Spanish Law against Usury, any contract that provides for an interest rate that is substantially higher than the normal interest rate and is not proportional to the market conditions and the circumstances of the transaction should be deemed as void. Spanish case law has established that the normal interest rate is determined according to the official statistics registered by the Bank of Spain in relation to the interest rates applied by financial institutions.

5. Guarantees and Security

5.1 Assets and Forms of Security

An extensive variety of assets can typically be given as an in rem security interest under Spanish law. The most common assets are shares (in the form of either *acciones* or *participaciones*), bank accounts, and credit rights arising from certain agreements such as intercompany loan agreements, lease agreements or sale-purchase agreements. Accordingly, the list of assets that can be included in a security package is long and should be negotiated on a case-by-case basis considering the type of transaction, the relevant assets, and the agreed security principles, if applicable, which will typically require a cost-benefit analysis when negotiating the security package.

In principle, an asset to be given as security under Spanish law should be located in Spain or, in the case of credit rights, the underlying agreement should be subject to Spanish law. Notably, certain Spanish regional laws might be applicable to assets located in Spanish regions.

Security interests can mainly take four main forms, depending mostly on the type of asset to be given as in rem security interest:

- **Mortgages:** this is the form of in rem security interest for real estate assets and movable assets (eg, aircraft, vessels, vehicles, industrial machinery, IP rights or business premises). Mortgages shall be granted in an *escritura pública* in front of a Spanish notary public and then registered with the relevant public registry. Mortgages attract stamp duty, which can range from 0.5% to 2% of the maximum secured amount depending on the region where the assets are located. Ship mortgages are an exception, as they are not required to be documented in an *escritura pública* and thus stamp duty should not apply.
- **Possessory pledges:** this is the most common form of in rem security interest when granting security over assets that are not subject to a mortgage. Possessory pledges are

generally documented by means of a *póliza* and so should not attract stamp duty. As a perfection requirement, the possession of the asset granted as security shall be transferred to the creditor or to a third party, which is typically the security agent. For assets that are not physically transferable, certain actions shall be carried out under the pledge agreement that are equivalent to the transfer of possession of the relevant asset (eg, delivering notices).

- *Non-possessory pledges*: there are two main characteristics that distinguish this type of pledge – the asset subject to the pledge does not need to be delivered to the secured parties, and, in order to perfect the in rem security interest, the pledge should be registered in the relevant movable assets registry. This type of in rem security interest is generally documented in a *póliza* and therefore does not attract stamp duty.
- *Promissory mortgages*: although a promissory mortgage does not create a valid and enforceable in rem security interest creating a direct right over a determined asset nor a privileged/senior claim, it is a commonly used type of quasi-security that avoids stamp duties and gives the beneficiary the right to convert the promise upon the occurrence of certain events, usually an event of default.

All the security documents listed above shall be executed in front of a Spanish public notary, with all parties to the relevant documents appearing with notarised and apostilled powers of attorney. Tax identity numbers as well as ultimate beneficial owners must be disclosed to the notary public, unless any exception applies. Notarial fees are calculated based on the amount of the transaction, although they are negotiable when the amount exceeds around EUR6 million. Registrable security documents must be filed before the applicable registry, which can deny registration if it considers that the security document filed has any defect or lacks any required information for the purposes of registration. Registration costs are standardised and are usually not material.

Finally, it is common practice in Spain for the pledgor, mortgagor or promissor to grant an irrevocable power of attorney in connection with the in rem security interest in favour of the security agent, so that it can perform any required action for the granting, protection, elevation or enforcement of the in rem security interest on behalf of the pledgor or mortgagor if the latter does not meet its obligations.

5.2 Floating Charges or Other Universal or Similar Security Interests

Floating charges are not recognised under Spanish law, and security must be granted in a single notarial document (either a pledge or mortgage, as applicable) for each class of asset. In addition, if there is an amendment to the secured obligations or the pledged/mortgaged asset, the security document should be amended by means of a deed of amend-

ment, extension and/or ratification, as applicable, in front of a notary public.

5.3 Downstream, Upstream and Cross-stream Guarantees

As a general principle, the granting of in rem security interests or guarantees by Spanish companies shall be subject to a corporate interest analysis, which is not expressly regulated under Spanish law. It is not always easy to determine whether the granting of an in rem security interest or guarantee falls within the corporate interest, so this issue should be analysed on a case-by-case basis.

Recent court rulings have required a direct or indirect tangible benefit for the Spanish obligor when granting in rem security interests or guarantees. The analysis is highly fact-specific.

Regardless, it is standard and advisable to request both shareholder and board approval when granting an upstream guarantee or in rem security interest.

5.4 Restrictions on Target

One of the key aspects to be analysed from a Spanish perspective when structuring financing or refinancing transactions with a Spanish component is the impact of the financial assistance prohibition under Spanish law. Spanish companies cannot provide funds, grant loans, grant guarantees or in rem security interests, nor provide any kind of financial assistance for the purposes of acquiring their own shares or the shares of their parent companies (in the case of a *sociedad anónima*, or public limited liability company), with the exception of employees acquiring shares of the company or another company within the group or financial entities in the ordinary course of its business or any of its group companies (in the case of a *sociedad limitada*, or private limited liability company). Failing to comply with the Spanish financial assistance regulation may result in the in rem security interest or guarantee being declared null and void. Furthermore, directors may face civil liability claims and potentially even criminal offence charges.

The main objective of this prohibition is to protect the assets of the company from being diluted, and to preserve the interests of shareholders and creditors. To this end, the risk should be lower when there are no minority shareholders or third-party creditors.

5.5 Other Restrictions

Further to all of the above, in order to formalise a global real estate mortgage, certain requirements must be met, including that all lenders must be considered financial entities as defined in Article 2 of Law 2/1981, of 25 March, on the regulation of the mortgage market.

In accordance with Spanish law, the management body of the company is entitled to approve the acts of the company that are included within its corporate purpose.

Shareholders' approval may also be required in the case of *sociedades limitadas*. It is not required in the case of *sociedades anónimas*, although it may be advisable to obtain approval in order to mitigate the personal liability of the directors (and, as stated above, shareholders' approval is advisable, in any case, when granting upstream guarantees or in rem security interests).

Notwithstanding the above, granting an in rem security interest should be approved by the shareholders whenever the assets given are essential for the company, which is presumed when those assets represent more than 25% of the total assets of the company.

5.6 Release of Typical Forms of Security

An in rem security interest under Spanish law is ancillary to the main obligation it secures, so it is automatically released when the secured obligations are repaid in full or discharged in any other way.

However, certain formalities must be completed for the release of an in rem security interest subject to Spanish law. To this end, a Spanish deed of release should be executed before a Spanish notary public (and registered when releasing a registered in rem security interest) so that the applicable formalities are carried out.

5.7 Rules Governing the Priority of Competing Security Interests

A Spanish in rem security interest follows the principle of prior in tempore, potior in iure, which in this case means the priority of an in rem security interest over a particular asset is determined by the date on which such in rem security interest was created.

A Spanish in rem security interest can be contractually subordinated, although all affected creditors will need to contractually agree on the stated subordination.

The Spanish insolvency waterfall is mandatory, so contractual subordination provisions may not necessarily be recognised in the case of insolvency, but they would still be binding among the relevant parties.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Under Spanish common law, a direct sale or appropriation of pledged assets is generally not permitted. Nonetheless, secured parties may be able to enforce an in rem security interest through judicial or extrajudicial proceedings.

Court enforcement proceedings are set out in Article 681 et seq. of Law 1/2000, of 7 January, of Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*), which foresees a public auction of any type of pledged or mortgaged assets supervised by the court.

The notarial or extrajudicial proceeding offers the secured parties an alternative proceeding based on an out-of-court public auction sale, which takes place under the direct supervision of a Spanish notary public. This regime is set out mainly in Article 1,872 of the Spanish Civil Code, but it is also regulated by certain supplementary provisions in Chapter V of Title VII of the Spanish Notarial Law (*Ley del Notariado, de 28 de mayo de 1862*). This is an alternative enforcement proceeding of an in rem security interest through an out-of-court public auction sale proceeding, which must be carried out under the supervision of a Spanish notary public. The parties are given a degree of freedom in deciding the specific formalities of the process, which shall be agreed and further regulated in the security documents. The Spanish Civil Code merely sets out the following general enforcement requirements:

- it must be supervised by a Spanish notary public;
- the sale process must be carried out by means of a public auction, with the possibility of carrying out multiple public auctions if the first one is unattended or unsuccessful;
- notice needs to be given to the debtor and the pledgor;
- in order to participate in the bid, a deposit of 5% of the value attributed to the assets must be made. This requirement does not apply to secured parties initiating the enforcement proceeding; and
- direct appropriation of the assets is not contemplated, unless there is no bidder and the secured parties release the claim in its entirety. However, in the case of pledges over cash, enforcement can be carried out by means of set-off against the outstanding secured obligations and/or by direct appropriation of the cash deposited in the pledged bank accounts, subject to certain requirements.

The notarial proceeding is generally the most typical enforcement proceeding when Royal Decree Law 5/2005 (see below) is not available, as it gives the parties flexibility to determine the specific formalities of the process and should be significantly quicker than a court proceeding.

Although Spanish law allows for the execution of mortgages by both judicial and extrajudicial (notarial) means, the most recent case law seems to suggest that extrajudicial enforcement is not always available, particularly in those cases where the debtor is a consumer and the mortgaged property is the primary residence of the debtor.

Royal Decree Law 5/2005, of 11 March, on urgent reforms for the promotion of the productivity and for the improvement of the public hiring (*Real Decreto Ley 5/2005, de 11*

de marzo, de reformas urgentes para el impulso a la productividad y para la mejora de la contratación pública – RDL 5/2005), which implemented the EU Collateral Directive in Spain, expressly sets out the possibility of the enforcement of certain in rem security interests through a direct sale or direct appropriation upon the occurrence of an enforcement event, and provides for insolvency protection, subject to certain requirements.

RDL 5/2005 recognises the creation of in rem security interests over the following:

- cash, understood as money credited to any account and in any currency;
- negotiable securities or other financial instruments defined in Royal Decree Law 4/2015, of 23 October, approving the consolidated text of the Spanish Securities Markets Act (*Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores*), as well as direct or indirect rights on said securities or financial instruments; and
- credit rights, defined as monetary rights arising from an agreement by which a credit institution undertakes to make a line of credit in the form of a loan or credit available to the other party (excluding consumers and small businesses from this definition, with certain exceptions).

However, the scope of RDL 5/2005 is more limited, and its applicability must be determined on a case-by-case basis depending on whether the pledge is created over any of the abovementioned assets and if, among other requirements: (i) none of the parties to the transaction is a natural person, and (ii) at least one of them is a public entity, a central bank, a credit institution, an investment services company, an insurance company, a real estate collective investment undertaking, or any of its management companies, mortgage securitisation funds, asset securitisation funds, or any of the management companies of a securitisation fund, pension fund, or other financial institution, as defined in Article 4 (5) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 or secondary market bodies and management companies of those secondary markets, clearing system companies, entities referred to in Law 41/1999, and equivalent entities operating in the options, futures and derivatives markets.

The main enforcement advantages of RDL 5/2005 for secured parties are direct sale or direct appropriation, its insolvency privileged regime and the absence of formal requirements such as registration, notifications or transfer of possession. The only formality of this type of pledge is that it must be formalised in writing.

6.2 Foreign Law and Jurisdiction

The choice of a foreign law as the governing law of the contract will be upheld by Spanish courts, subject to the terms

of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (Rome I Regulation). In situations involving a conflict of laws, the Rome I Regulation shall apply to contractual obligations in civil and commercial matters, regardless of whether or not it is the law of a Member State of the European Union.

The foreign law shall be evidenced to the Spanish courts pursuant to Article 281 of the Spanish Law of Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*), as amended from time to time, and pursuant to Article 33 of the Law 29/2015, of 30 July, or Law of International Legal Cooperation in Civil Matters (*Ley 29/2015, de 30 de julio, de Cooperación Jurídica Internacional en material civil*).

The choice of a foreign law will not be recognised or upheld by Spanish courts if it is inconsistent with or overridden by the Rome I Regulation, particularly in connection with the following circumstances:

- the application by Spanish courts of the Spanish “overriding mandatory provisions” as defined in Article 9.1 of the Rome I Regulation;
- the effect which, pursuant to Article 9.3 of the Rome I Regulation, may be given by Spanish courts to the “overriding mandatory provisions” of the law of the country where the obligations arising out of a contract must be or have been performed, insofar as those provisions render the performance of the contract unlawful; and
- the potential application by Spanish courts pursuant to Article 12.2 of the Rome I Regulation of the laws of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance.

The choice of a foreign law shall not be made with the intention of avoiding the application of mandatory provisions of Spanish law. Thus, when applying the law of any jurisdiction, Spanish courts may give effect to the mandatory rules of another jurisdiction with which the situation has a close connection if and insofar as, under the law of the latter jurisdiction, those rules must be applied, whichever the chosen law.

The submission to a foreign jurisdiction is generally upheld by Spanish courts. However, Spanish courts may not recognise a submission to the jurisdiction of foreign courts, in which case such submission may not be valid and binding under the laws of the Kingdom of Spain, and they may not accept jurisdiction to determine the matter or may stay or strike out proceedings in certain circumstances, provided that:

- there is some other forum with competent jurisdiction, which in each case is more appropriate for the trial of the action;
- the proceedings involving the same cause of action and between the same parties are pending in another jurisdiction;
- the merits of the issues in dispute have already been judicially determined or should have been raised in previous proceedings between the parties; or
- Spanish courts have exclusive jurisdiction.

Spanish courts have exclusive jurisdiction, *inter alia*, with respect to matters relating to the incorporation, validity, nullity and dissolution of companies or legal entities whose domicile is in the territory of the Kingdom of Spain, to any decisions and resolutions of their corporate bodies, to the validity or nullity of any recordings with a Spanish registry, and to the recognition and enforcement in the Kingdom of Spain of any judgment or arbitration award obtained in a foreign country.

In general terms, a Spanish entity does not have a right of immunity from suit, execution or attachment in Spain. Nevertheless, there is a general principle of Spanish public law that tends to prevent the interruption of the provision of public services. In this sense, the assets subject to a public service shall benefit from special protection against attachment or seizure. The power of disposal over private assets affected to the provision of a public service during the period of affection (*afectación*) is limited.

6.3 A Judgment Given by a Foreign Court

A judgment or an arbitral award rendered by a foreign court or an arbitral tribunal is enforceable in Spain if certain conditions are fulfilled. Those conditions vary depending upon whether or not the judgment is rendered by the court of a Member State bound by EU Regulation 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Reglamento (UE) N° 1215/2012 del Parlamento Europeo y del Consejo de 12 de diciembre de 2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil*).

A judgment rendered by a court bound by Regulation 1215/2012 would be binding upon and enforceable by Spanish courts without reconsideration of the merits, subject to providing the following:

- a copy of the judgment that satisfies the conditions necessary to establish its authenticity;
- a certificate issued pursuant to Article 53 of Regulation 1215, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable

costs of the proceedings and the calculation of interest; and

- a translation or a transliteration of the contents of the foregoing certificate, if required by the competent enforcement court. However, it would be subject to the grounds of opposition set forth in Regulation 1215/2012 and the Spanish Law of Civil Procedure.

A judgment duly rendered by a foreign court not bound by Regulation 1215/2012 would be enforceable in Spain in accordance with and subject to Article 523 of the Spanish Law of Civil Procedure, and subject to the Law on International Legal Cooperation in Civil Matters. Such provisions and the case law set forth that any final judgment rendered outside the Kingdom of Spain may be enforced in the Kingdom of Spain in the cases and in accordance with the provisions of any applicable treaty, and, in the absence of any such treaty, subject to the provisions and grounds of opposition set forth in the Law on International Legal Cooperation in Civil Matters.

Spanish law provides that the enforcement in Spain of judgments issued by foreign courts is subject to the appropriate order (*exequatur*) being obtainable, according to the provisions of any applicable international treaty and, in the absence of any such treaty, according to the provisions of Law on International Legal Cooperation in Civil Matters. In addition, the following conditions shall be met:

- the judgment is final and conclusive (*firme*);
- the judgment shall not be contrary to the Spanish principles of public policy (*orden público*);
- the judgment has been issued in the context of litigation proceedings where the defendant was duly and timely notified of the proceedings against it and was given the opportunity to defend itself, and due process has been observed;
- the subject matter of the judgment must not be one of the matters over which Spanish courts have exclusive jurisdiction or, with regard to other matters, the jurisdiction of the foreign court is due to a reasonable connection therein, and the choice of law is not fraudulent;
- there is no material contradiction or incompatibility with a judgment rendered or judicial proceedings outstanding in Spain; and
- there is no material contradiction or incompatibility with an earlier judgment rendered in any other State, provided that such judgment complies with the applicable conditions to be enforceable in Spain.

6.4 A Foreign Lender's Ability to Enforce Its Rights

The enforcement of any judgments in Spain involves, *inter alia*, the following principal actions and costs:

- documents in a language other than Spanish being accompanied by a sworn translation into Spanish;

- the payment of certain professional fees required for the verification of the legal authority of a party litigating in Spain (if needed);
- the payment of certain court fees;
- the procedural acts of a party litigating in Spain must be directed by an attorney-at-law, and the party must be represented by a court agent (*procurador*); and
- the content and validity of foreign law must be evidenced to the Spanish courts.

In addition, Spanish civil proceedings rules cannot be amended by agreement of the parties, and such rules will therefore prevail, notwithstanding any provision to the contrary in the relevant agreement.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

There are different ways of making out-of-court settlements under Spanish law, including collective refinancing agreements, individual refinancing agreements, and court-sanctioned arrangements (known as the “Spanish scheme of arrangement”).

In a pre-bankruptcy situation, a collective refinancing agreement is a notarised agreement that satisfies the following conditions:

- it has the support of creditors holding at least 60% of the debtor’s total liabilities;
- it extends maturity dates and/or grants new credit and/or amends financial obligations; and
- it is based on a business plan that allows business activity to continue in the short and medium term.

An individual refinancing agreement is a notarised agreement that is not supported by most of the creditors – unlike the collective agreement – but is protected if it meets certain requirements, including the following:

- it improves the ratio of assets over liabilities;
- it ensures that the current assets are no less than the current liabilities; and
- the value of the resulting guarantees is not a greater proportion of the outstanding debt owed to the creditors than it was prior to the refinancing, and does not exceed 90% of the value of the outstanding debt owed to the creditors.

The Spanish scheme of arrangement is a collective agreement that has the support of creditors holding at least 51% of the financial liabilities, and is sanctioned by a judge. The most significant characteristic of this arrangement is that dissent-

ing and abstaining financial creditors can also be crammed-down, subject to certain requirements and limitations.

Another relevant tool is Article 5 bis, which enables debtors to postpone the declaration of bankruptcy and block insolvency filings by creditors and, broadly speaking, enforcements. The general rule is that the debtor must file for insolvency within two months of the date on which the debtor’s insolvency was known or should have been known. This article gives the debtor the opportunity to obtain an additional four-month period. For this to happen, companies must (basically) state to the court that they are involved in negotiations for a refinancing agreement.

It is also important to highlight the new Directive (EU) 2019/1023, which adopts new tools for implementing preventative restructuring procedures in the EU, in an effort to improve legal certainty for international investors and European companies, and to seek new ways to approach business failure and insolvency in a unified way across the EU. The transposition of the Directive will require the adaptation of the Spanish Insolvency Act. In this regard, the introduction of one or more efficient early-warning tools to detect pre-insolvency situations is essential, as is the novelty of the restructuring practitioners in the preventative framework. Transposing the Directive will also require relevant reforms in the actual stay of individual enforcement actions framework, as well as new protections for dissenting creditors in terms of a cram-down. Another notable amendment would be the distinction of additional classes of affected creditors, the introduction of a treatment for the contingent credits, and new benefits for SMEs in the insolvency stage. However, the Directive establishes a minimum harmonisation, granting Member States flexibility in the implementation.

7.2 Impact of Insolvency Processes

Insolvency proceedings prevent the enforcement of the lender’s in rem security interest. A declaration of bankruptcy sets an automatic stay of all the enforcement actions over the assets of the insolvent debtor that are linked to the general running of the business. This situation remains unchanged until a voluntary creditor’s arrangement is approved, the insolvent company is liquidated, or one year passes from the date of the declaration (with some limited exceptions).

Once the borrower is declared insolvent, the next step is the determination of the assets and liabilities. When the debtor has identified its creditors, the bankruptcy judge notifies them of the start of the procedures and their obligation to make their claims under the agreement with the Spanish Insolvency Act. If the creditor’s claim is late, its credit can be classified in certain cases as subordinated.

One of the principles that inspires the Spanish Insolvency Act is the equal treatment between creditors (*par conditio creditorum*). There are few exceptions to this principle. Tak-

ing this principle into account, as a starting point, the creditor's claims are classified as privileged, ordinary or subordinated. Privileged claims have better treatment than ordinary claims, and ordinary claims have better treatment than subordinated claims. Thus, the order of payment to creditors is: first, creditors with privileged claims; second, creditors with ordinary claims; and third, creditors with subordinated claims.

7.3 The Order Creditors Are Paid on Insolvency

Before listing the order in which creditors are paid in a company's insolvency, it is relevant to know that claims against the entire insolvency estate (*créditos contra la masa*) must be satisfied beforehand. The estate claims are those that arise from the insolvent company's day-to-day operations as from the date of the declaration of insolvency. Having said that, the order is basically as follows:

- Claims with special privilege: these are the credits that are secured, generally by a pledge or a mortgage. This privilege covers only the part of the credit that is covered by the secured obligation.
- Claims with general privilege: this stage includes credits of salaries and employee compensations (with certain limits). It also includes the amounts corresponding to tax and social security withholdings owed by the insolvent party in compliance with a legal obligation, as well as certain loans involving new cash receipts granted under a refinancing agreement that complies with certain requirements.
- Ordinary claims: these claims are not classified as privileged or subordinated, but are the remaining unsecured commercial claims.
- Subordinated claims: these are claims that were not reported in due time, claims that – by contractual agreement – are subordinated to all claims, claims for interest of any kind (except when secured up to the secured amount), and claims for fines and other sanctions. In addition, these are the claims by creditors that are specially related to the insolvent debtor (managers, partners, or intra-group loans, as explained in more detail in 7.4 **Concept of Equitable Subordination** below).

7.4 Concept of Equitable Subordination

The Spanish Insolvency Act establishes the concept of equitable subordination, in particular in Article 93, which sets out that equitable subordination arises when:

- a creditor directly or indirectly holds, at the time the credit rights arise, 5% of the share capital of the debtor (if the debtor is a listed company) or 10% (otherwise);
- the creditor is a company that belongs to the same group of the insolvent debtor and has common shareholders to the extent such shareholders directly or indirectly hold 5% of the share capital of the debtor (if the debtor is a listed company) or 10% (otherwise); and

- the creditor is a legal or de facto director, liquidator or general attorney.

According to the Spanish Insolvency Act, there is a presumption that any entity acquiring a credit from a creditor who is specially related to a debtor is also specially related to such debtor if the acquisition of the credit was effected in the two years prior to the declaration of insolvency, unless evidence is provided to the contrary.

7.5 Risk Areas for Lenders

Lenders must be aware of potential issues that can affect their situation if the borrower become insolvent. The most common risks for lenders include the following:

- A two-year claw-back period is established under Article 71 of the Spanish Insolvency Act, by virtue of which any act or agreement that is deemed to be detrimental for the debtor's estate in the two years prior to the declaration of insolvency will be null and void, even if there was no wilful or fraudulent intention. The article discerns between acts/transactions that are automatically presumed as detrimental (without admitting evidence to the contrary) for the debtor's estate and acts/transactions that admit evidence. Generally, the ones that are automatically presumed as detrimental are liberalities, and the ones that admit evidence are onerous. However, Article 71 bis of the Spanish Insolvency Act sets out exceptions to the claw-back period for agreements entered into at a refinancing stage that extend the credit in a significant amount or modify some terms of the agreement for the debtor's benefit, as well as all the ordinary transactions of the insolvent company's business activity.
- In order to have access to the most efficient enforcement proceeding, the documents by virtue of which the secured obligation is created must be notarised as public documents.
- Under Spanish law, not all events of default listed in a loan agreement will be admissible for enforcement.
- As a civil code jurisdiction, Spanish courts have a more subjective approach to interpretation, which could result in interfering with contractual rights if the courts deem it appropriate to do so.
- The application of Article 5 bis of the Spanish Insolvency Act may have an important impact for lenders. If the borrower makes the communication established in the article above, judicial or extrajudicial enforcements of rights or assets that are necessary for the continuity of the debtor's business activity cannot be initiated, and any enforcement proceeding will be suspended.

8. Project Finance

8.1 Introduction to Project Finance

Spain has historically been an active country on project finance. However, the outbreak of the financial crisis severely affected project finance transactions and froze some estate plans, including, for example, the Extraordinary Plan for Roads (*Plan Extraordinario de Inversiones en Carreteras*), the implementation of which has suffered a significant delay due to political instability and bankruptcy among the traditional concessionaires. Today the situation in terms of acceding to financings is different; there is more liquidity in the banking and finance market, which has led to a revival of the project finance market in Spain. As such, infrastructure funds continue to gather market share on both the equity and the lending side.

Likewise, the sustained growth of the Spanish economy has made it possible to continue with investments in different projects, notably in the renewable energy sector. However, observers must be aware of the Spanish political instability, which has caused problems in the regulatory field and public investment.

8.2 Overview of Public-Private Partnership Transactions

There is no explicit legislation for public-private partnership transactions per se. However, the Spanish Public Sector Contracts Act sets forth a broad regulation on public-private partnerships relating to matters such as termination provisions, faculties of the public administration, rights and duties of the contractors, etc.

Public-private partnership structures have been used in Spain for different types of infrastructure, notably transportation (railways, ports, airports, subways, etc) and social services (universities, penitentiaries and clinics).

As a decentralised country, Spain does not have a centralised public-private partnership public authority. Therefore, public-private partnership operations can be launched by central, autonomous or municipality public bodies.

8.3 Government Approvals, Taxes, Fees or Other Charges

In general terms, a project finance transaction is not subject to governmental authority; however, depending on the field in which the transaction is carried out, sectorial authorisations may be requested, especially in the energy field.

Following Spanish regulations and the harmonisation of the EU Directives, project finance transactions are subject to not only the approval of the applicable Spanish institutions depending on the characteristics of the project, but also the payment of the relevant taxes, based on the construction of infrastructure and the use of the land. The amount charged

will vary depending on the extension – in terms of time – of the use of the land.

Due to the division of the Spanish state in different regions, additional royalties must be paid to local institutions. These taxes vary from one region to another.

8.4 The Responsible Government Body

The responsible government body depends on the sector in which the project finance transaction will be carried out.

The main government body responsible for granting the relevant authorisations for the activities of exploration, investigation and exploitation in a project in the field of oil and gas is the Ministry for the Ecological Transition (*Ministerio para la Transición Ecológica*). The main piece of regulation that governs the oil and gas sector is Act 34/1998, of 7 October, on the Hydrocarbons Sector (Hydrocarbons Act), as amended. In recent years, the gas market has undergone several changes, specifically with regard to the remuneration framework for regulated gas activities (gas distribution, transmission, regasification, and storage activities) that was approved by the Spanish government by means of Royal Decree-Law 8/2014 of 4 July (RDL 8/2014), which approved urgent measures to encourage growth, competitiveness and efficiency. This regulation was incorporated definitively into the Spanish legal system through the enactment of Act 18/2014, of 15 October (Act 18/2014), which included commercial deregulation measures and also established an energy efficiency system in line with EU Directives. On 21 May 2015, Act 8/2015 was enacted, amending the Hydrocarbon Acts and establishing certain tax and non-tax measures in respect of the exploration, research and exploitation of hydrocarbons.

The Ministry for the Ecological Transition is also responsible for the authorisation of projects in the field of electricity. The Electricity Sector Act 24/2013, of 26 December (Electricity Act 24/2013), is the main regulation in the electricity sector, and amends the remuneration scheme that existed under the Electricity Act of 1997, which has been repealed. Royal Decree 413/2014, of 6 June, the regulation on renewable energy electricity generation activity (RD 413/2014) regulates electricity generation activity using renewable energy sources, cogeneration and waste.

Royal Decree 1955/2000 of 1 December, as amended by the Electricity Act 24/2013, regulates the regime applicable to transportation, distribution, commercialisation and supply activities. The management of transportation, as a regulated activity, is entrusted to Red Eléctrica de España, which is also the system operator.

Finally, the General Directorate of Mining of the Ministry for the Ecological Transition is the government body responsible for granting the relevant authorisations in the field of mining. The mining sector is mainly governed by

Act 22/1973, of 21 July, on Mining and by Royal Decree 2857/1978, of 25 August, approving the general regulation for the mining sector.

Regional governments also have competences concerning oil and gas, electricity generation, and mining developed within their territory.

8.5 The Main Issues When Structuring Deals

There are different challenges to face when structuring a project finance deal, with the following being the most common:

- *Control of cash flow*: the key factor in project finance is the generation of cash flow (its predictability and certainty), with which income the debtor will cover the debt service and the principal to be repaid. The bank's principal interest is the control of the cash flow – banks will always try to have severe control, unlike the debtor, which prefers to have the freedom to be able to dispose of cash flows. A common structure for the protection of cash flows is as follows:
 - (a) funds are deposited in a restricted account, pledged in favour of the debt providers;
 - (b) essential costs and expenses for the project and the operational expenses of the project are the first to be paid;
 - (c) the interest and commissions of the finance are paid next. If there is a hedging agreement, the costs of hedging must also be paid; and
 - (d) from the remainder, a distinction must be made as to whether amortisation of the principal must be made. If the payment of amortisations has not been stipulated, the remainder may be freely disposable.
- *Security package*: project finance operations present certain peculiarities in the structuring of the security package. Taking into account the exposure of the lenders to the success of the project, it is key that creditors receive a robust collateral package that extends to each of the debtor's essential assets. For this reason, there is usually a requirement of a support contract of partners and a set of pledges of all kinds, including:
 - (a) pledges on the company's shares;
 - (b) pledges over the various project accounts; and
 - (c) pledges on the credit rights arising from all contracts relating to the project.

8.6 Typical Financing Sources and Structures for Project Financings

The typical structure of a project finance deal is based on a Special Purpose Vehicle (SPV) incorporated by a pool of investors. The aim of this structure is to limit access for the lender to the project's income, so that it is non-recourse or limited-recourse to the patrimony of the promoters. The SPV receives the funds and executes the project directly or through its subsidiaries, with limited development for other activities.

Unlike other traditional forms of finance, the financial solvency of the debtor is not fundamental. However, lenders must rely mainly on the future capacity of the project to generate the necessary cash flow to meet the payment obligations. In order to achieve this, it is essential to carry out an exhaustive study and a review of all the risks of the project.

Another important aspect of a project finance deal is the covenants. For a successful project, it is necessary to impose a series of strict covenants related to continuous information on the status of the project. As such, in project finance, covenants are a fundamental part of the agreement.

8.7 The Acquisition and Export of Natural Resources

Due to Spain's lack of the main natural resources, this is not the most active sector for project finance.

8.8 Environmental, Health and Safety Laws

Project finance transactions have a significant environmental impact and thus are generally subject to the granting of integrated environmental authorisations as required by Royal Legislative Decree, of 16 December, approving the consolidated text regulating the integrated pollution prevention and control. Notably, an autonomous region could have enacted its own act for integrated pollution prevention and control, and, consequently, the regional government will be responsible for granting such authorisation.

Regarding potential soil and groundwater contamination, the basic regulation in Spain is Law 22/2011, of 28 July, on Waste and Contaminated Soils (Regulation on Waste and Contaminated Soils); some autonomous regions have also passed regulations. Pursuant to the Regulation on Waste and Contaminated Soils, each autonomous region shall maintain a list of contaminated land. Moreover, Royal Decree 9/2005, of 14 January, establishes a list of potentially contaminating activities and the criteria and standards for the declaration of polluted soils. The owners of land where potentially soil-contaminating activities have been performed should disclose such fact in a public deed if there is a transfer. Under Spanish law, if soil is declared contaminated, those persons held liable for said contamination would be compelled to put the necessary remediation measures in place. In this regard, the principle of "polluter pays" informs the Spanish regulations on soil and groundwater contamination. For this reason, the persons potentially liable are, firstly, the polluter or polluters, in accordance with the general principle of "polluter pays", or the property owners and those in possession. The persons held liable (others than the polluter) could seek to pass on remediation costs to the polluter or polluters.

The water regime is set forth in Legislative Royal Decree 1/2001 of 20 July, approving the Spanish Water Law, which seeks to ensure the protection of the hydraulic public domain. According to the regime, any activity related to

the discharge of water that could pollute or degrade public waters requires the correspondent administrative authorisation for the discharge.

9. Islamic Finance

9.1 The Development of Islamic Finance

There does not appear to be any consolidated Islamic finance practice in Spain.

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9.2 Regulatory and Tax Framework

Tax legislation in Spain does not provide a specific framework for Shari'a-compliant financial products, and there are no precedents issued by the Spanish tax authorities and courts testing the features of such Islamic financial products. Consequently, the Spanish tax implications for such products should be assessed on a case-by-case basis, taking into account the specific features of each arrangement, pursuant to the general Spanish tax rules.

9.3 Main Shari'a-compliant Products

There does not appear to be any consolidated Islamic finance practice in Spain.

9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

Precedents are unknown, so it is difficult to predict how Spanish courts would treat sukuk holders in insolvency or restructuring proceedings.

9.5 Recent Notable Cases

Recent notable cases are unknown.