Pardini & Asociados
Attorneys • Abogados

BANKING & FINANCE

Contents

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If you have any specific questions about any legal matter, contact us.

Banking Services and Capital Markets

1. Loan Market Overview

1.1 The Regulatory Environment and Economic Background

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

1.2 Impact of Global Conflicts

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

1.3 The High-Yield Market

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

1.4 Alternative Credit Providers

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

1.5 Banking and Finance Techniques

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

1.6 ESG/Sustainability-Linked Lending

ESG and sustainability financing remain a top priority and concern in the finance sector. Market trends show increased issuance of green bonds and financing agreements with stricter ESG clauses, applicable not only to foreign investment but also to local investment requirements, regardless of the project type.

2. Authorization

2.1 Providing Financing to a Company

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

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

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

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

3. Structuring and Documentation

3.1 Restrictions on Foreign Lenders Providing Loans

There are no restrictions on foreign lenders providing loans.

3.2 Restrictions on Foreign Lenders Receiving Security

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

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls regarding foreign currency exchange.

3.4 Restrictions on the Borrower's Use of Proceeds

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

3.5 Agent and Trust Concepts

Agent and trust concepts are recognized in Panama.

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

3.6 Loan Transfer Mechanisms

Loan transfer mechanisms, including the transfer of associated security packages, exist in Panama. These mechanisms are generally embedded in the financing agreement and security package documentation, allowing lenders to freely transfer their position subject to an agreed-upon process and the execution of assignment agreements. While this has been the general practice, borrowers with leverage are increasingly negotiating assignment clauses to require their consent or provide them with the option to veto or choose the assignee.

3.7 Debt Buyback

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

3.8 Public Acquis

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

3.9 Recent Legal and Commercial Developments

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

3.10 Usury Laws

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

3.11 Disclosure Requirements

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

4. Tax

4.1 Withholding Tax

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

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

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

4.2 Other Taxes, Duties, Charges or Tax Considerations

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

Documents subject to foreign jurisdiction but used as evidence or for enforcement in Panamanian courts or administrative authorities are also subject to stamp tax.

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

5. Guarantees and Security

5.1 Assets and Forms of Security

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

Trusts

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

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

· Guarantee trust agreement: Its primary intention is to ensure the fulfilment of the "secured obligations" as defined in the respective trust agreement. This trust typically includes mortgage rights or pledge rights as trust assets, amongst others.
· Administration and guarantee trust agreement: In addition to ensuring fulfilment of the secured obligations, this has an additional purpose of administration of assets. Prior to a default that leads to the enforcement of the security interests, the trustee preserves, safeguards, and manages the trust's assets. Trust assets are usually shares or participation quotas, trust accounts (with their respective flows, which are assigned to the trust), real estate, among others.
In accordance with the Trust Laws, the trust agreement, in general, must comply with the following formalities for its establishment and validation:

· Trust agreement with only movable property as trust assets: This can be established via a private document signed between the parties. The signatures of the settlor(s) and the trustee must be authenticated by: (i) if signed locally, a local public notary; or (ii) if signed outside Panama, apostilled or certified by the Panamanian consul of the place of signature, for purposes of enforceability against third parties. Additionally, it should be noted that depending on the type of "movable property" transferred to the trust, compliance with certain registration requirements may be required (for example, if vehicles are part of the trust's assets, the change in owner must be documented in the municipality in which the vehicle is registered or there may be a requirement that the transfer document be made through a public deed).
· Trust agreement with real estate as trust assets: This must be established via a public deed and registered in the Public Registry for the transfer of the real estate to be transferred to the trustee. Therefore, the transfer of real estate to a trust will be enforceable against third parties from the date of registration in the Public Registry of the transfer in favor of the respective trust.
Shares (of a "sociedad anónima") or quotas (of a "sociedad de responsabilidad limitada") can also be transferred in favor of trusts, whether or not they are registered in the Public Registry (see the two bullet points above), as trusts that only hold shares or quotas are not required to be registered (nonetheless, the transfer or assignment of quotas does require said Sociedad de responsabilidad limitada to register the change in partner in the Panamanian Public Registry as detailed below). In this scenario, the trustee would become the shareholder/partner of the relevant company.

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

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

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

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

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

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

Pledges

The pledge agreement is regulated by Article 814 and subsequent articles of the Panamanian Commercial Code, which establish that (i) the pledge agreement must be established under the same formalities as the agreement it serves to guarantee; (ii) there must be “delivery” of the pledged asset to the creditor or to a depository chosen by the creditor and the debtor (ie, for purposes of a pledge over shares or quotas, the share/quota certificate must be actually delivered to the creditor or depositary, to be held in custody); and (iii) the agreement must be in writing.

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

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

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

- A blank endorsement of the share/quota certificates in the name of the trustee is commonly delivered, although it is not a requirement for the validity of the pledge. The blank endorsement is a risk mitigation tool that would assist the judicial or extrajudicial foreclosure process.
- An annotation in the share/quote registry book is made, to reflect the pledge.
- Similar to the transfer of shares/quotas in favor of the trustee, it is customary to request a certification from an authorized representative of the company whose shares/quotas are pledged, certifying that the pledge was annotated in the corresponding registry book.

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

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

Assignment Agreement

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

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

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

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

- Unconditional assignment of rights (cash flows): For these assignments to be effective against the assignor's counterparty (ie, the payor of the payable being assigned) so that the assignee (trustee) can directly collect them from said third party, the assignor must either notify the third party or obtain its consent, depending on the underlying contractual obligations with such third party. Notifications must comply with Article 789 of the Commercial Code, which states that the notification must be made "in the presence of two witnesses, or in another authentic form." The payor who refuses to recognize the assignee as creditor and wants to oppose the assignment, must object within twenty-four hours of being notified, after such time the assignment will be considered accepted for all legal purposes.
- Conditional assignment of material contracts: In order for the assignment of the material contracts to be perfected, the fulfilment of certain conditions is required, which are agreed upon as of the date of signing the respective assignment contract. The conditions of a conditional assignment may vary according to what the parties stipulate in the assignment agreement, but typically include: (i) notification of default under the financing documents; (ii) prior consent or notification from the respective counterparty; and (iii) designation of the assignee or indication of the capacity of the assignee to designate a new entity in favor of which the contract will be assigned in case of default. The purpose of the conditional assignment is to ensure, prior to a default, that the counterparties of the material contracts are aware of the financing documents and accept that, in the event of a default, they must proceed according to the instructions of the assignee and whoever they designate.

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

Real Estate Mortgage

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

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

Chattel Mortgage

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

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

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

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

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

5.2 Floating Charges and/or Similar Security Interests

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

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

5.3 Downstream, Upstream and Cross-Stream Guaranties

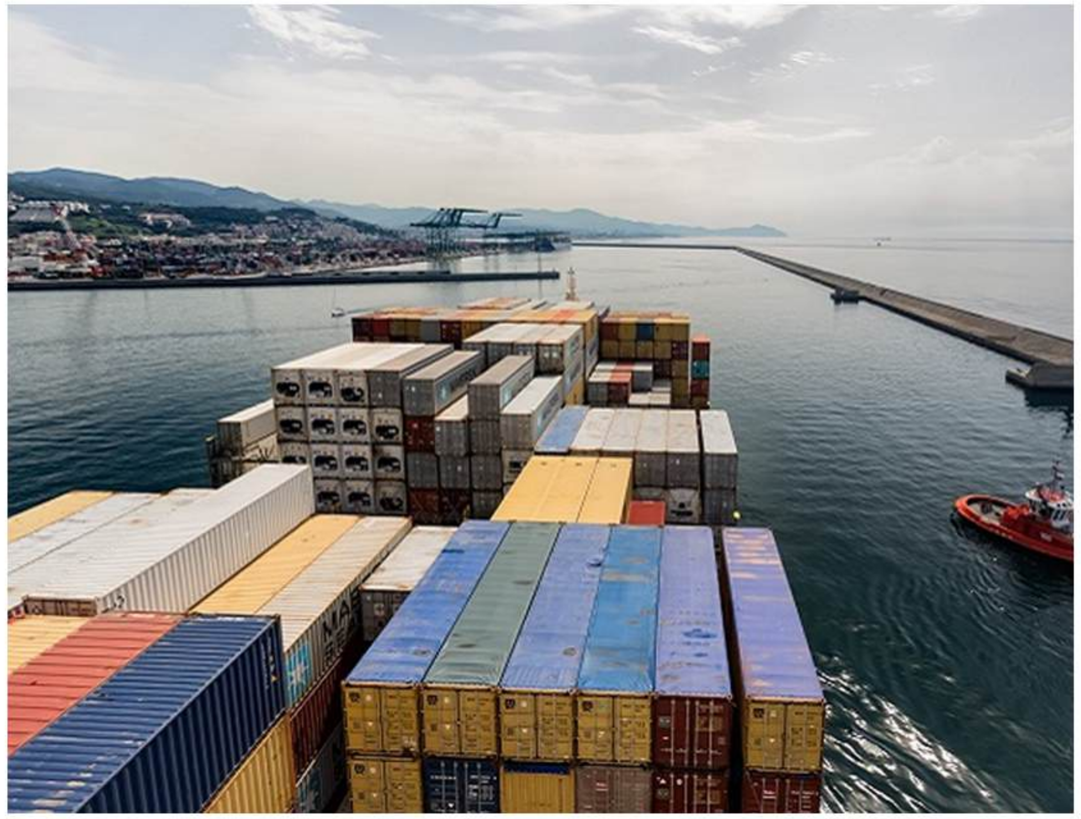
It is possible for entities in Panama to give downstream, upstream and cross-stream guarantees, and there are no general limitations or restrictions for doing so to the extent the necessary corporate authorizations are obtained and no limitation or restrictions exist in the corporate documents.

5.4 Restrictions on the Target

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

5.5 Other Restrictions

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



5.6 Release of Typical Forms of Security

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

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

5.7 Rules Governing the Priority of Competing Security Interests

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

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

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

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Usually, a secured lender can enforce its collateral under an event of default as outlined in the credit agreement or applicable collateral documentation regarding a specific transaction. Under Panamanian law, the enforcement of collateral by a secured lender can vary depending on the type of collateral involved (eg. real estate, movable assets, financial instruments) and the agreed terms between the parties. The lender may have the option to enforce the collateral either judicially or extrajudicially. Regarding a judicial enforcement, it involves the lender initiating legal proceedings in court to enforce their security interest. To this extent, the lender may opt to file for the seizure of the debtor's assets to ensure the payment of the owed funds prior to the final judgment. Please note that if the collateral involves an enforceable title ("título ejecutivo" in Spanish) as determined by the Panamanian Judicial Code, lenders can opt for an expedited procedure to enforce their rights.

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

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

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

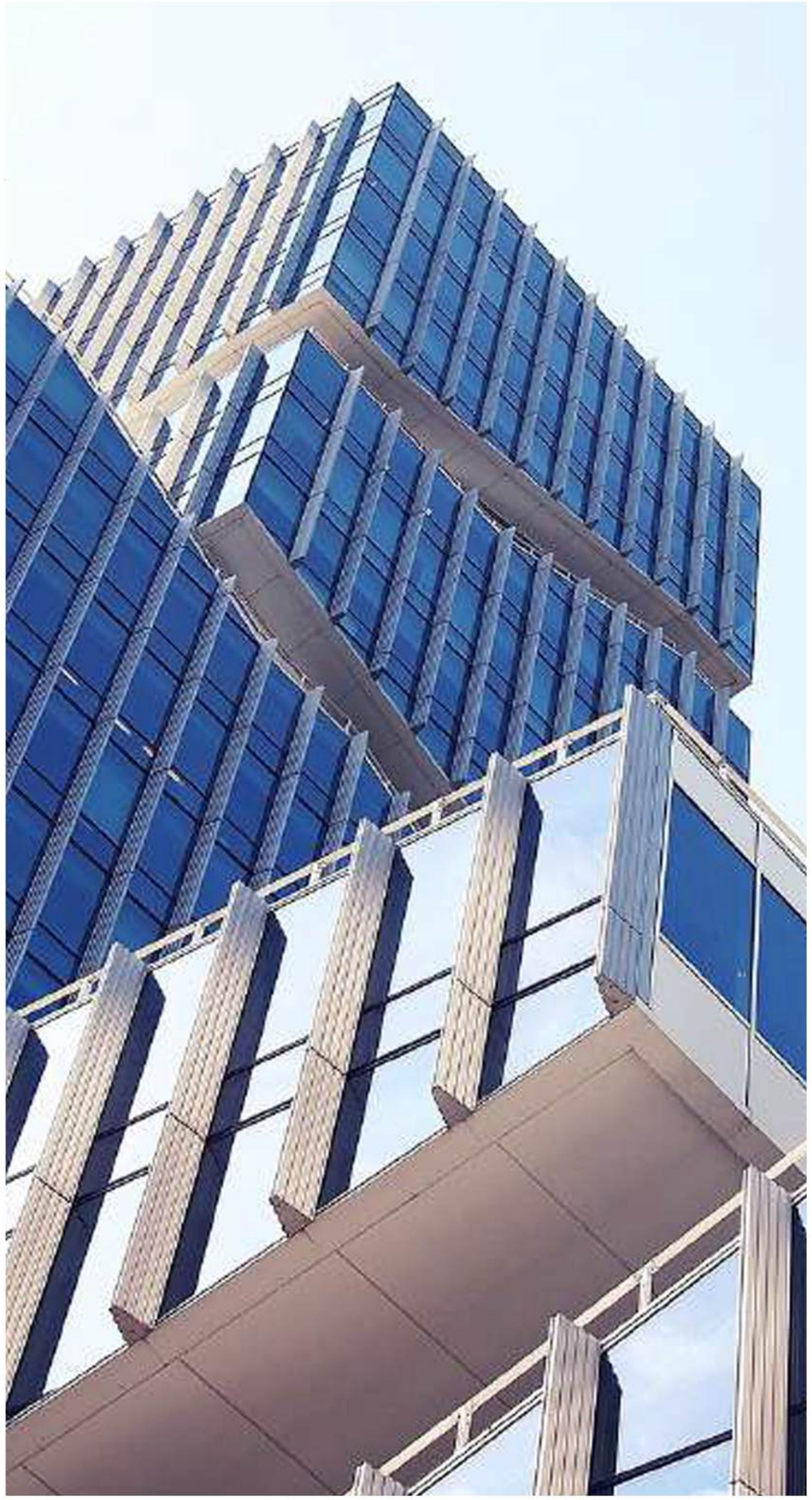
6.3 Foreign Court Judgments

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

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

6.4 A Foreign Lender's Ability to Enforce Its Rights

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



ABOUT THE FIRM

Pardini & Asociados is an international law firm with headquarters in Panama with 40+ years of tradition and experience advising foreign clients and corporations of all sizes.

Pardini & Asociados was founded in 1982 with an original practice in Corporate, Commercial, Admiralty and Maritime law, which still continues today.

Since then, our law firm has been at the forefront of many innovative legal developments and during the past 20 years, the law firm has developed a highly specialized practice in all areas listed below.

CORE STRENGTHS

We offer legal services linked to a broad scope of business needs. Our clients look for us for our experience and knowledge in any of these practice disciplines, our innovation and cost-effective results.

Our team is composed for the best legal specialists in different areas with a deep expertise in all major business sectors.

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RANKING & AWARDS

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