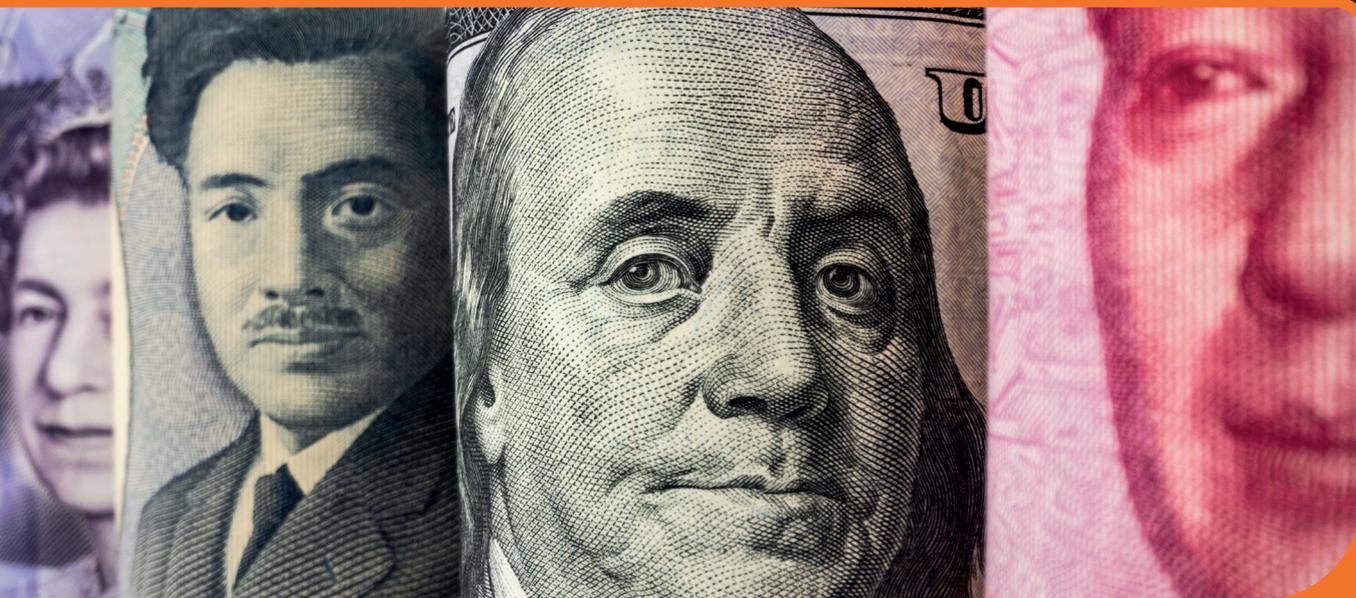


International Comparative Legal Guides



Practical cross-border insights into lending and secured finance

Lending & Secured Finance 2022

10th Edition

Contributing Editor:

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Morgan, Lewis & Bockius LLP

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1 Overview

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

Throughout 2021 and following some of the COVID-19 mitigation measures introduced during 2020 and 2021, one very important development should be mentioned that has had a general impact on the market and lending specifically. Starting in June 2021, and over the span of seven months, the Central Bank of Chile has gradually raised its Monetary Policy Rate “*Tasa de Política Monetaria*” from its legal minimum of 0.5%, at which it had stayed for over a year, to 5.5% by the end of January 2022. This has mainly come as a countermeasure to manage the inflationary effects of two COVID-19 mitigation measures, namely the possibility for citizens to withdraw cash from their pension funds, which was granted on three occasions, each time for 10% of the available funds up to a certain maximum, and the COVID-19 social subsidies, which both caused a substantial increase in liquidity and consequently in consumption. These steady rate increases by the Central Bank have partially mitigated some of the foreseen effects of the two previously mentioned public policies, but due to their magnitude, as well as the current global trends, inflation still rose to a significant 7.2% during 2021.

As for current legal, regulatory and market trends, focus has shifted away from COVID-19 mitigation measures and transitioned to the flexibilisation of certain market operations, the strengthening of consumer rights, the replacement of LIBOR rates as well as the proposition of framework regulations supposed to enable a better adaptation to emerging technologies, platforms and companies:

- Some of the legal changes introduced to increase flexibility of certain market operations, as well as strengthening consumer rights, include on one hand the possibility to grant postponement of some instalments of credits on mortgage loans, as well as simplifying and broadening the scope for the opening of bank accounts. On the other hand, there is the introduction of stricter disclosure and compliance requirements by financial advisors, as well as changes introduced to the credit operations law (Law No. 18,010) regarding the prohibition of capitalisation of moratory interest, specification of accrual of interest over outstanding principal, excluding repaid principal, and new requirements for the charging of fees not counted as interest.

- For details on the replacement of LIBOR rates, see question 11.1.
- Following a critical report by the National Commission for Productivity, issued during the first semester of 2021, which pointed out the existence of regulatory barriers and the lack of enabling conditions for new technologies and models to thrive, the government introduced a “Fintech Bill” to Congress in September 2021. The proposed bill intends to provide conditions and a framework for these advancements to be better integrated, as well as amendments to current legal bodies, such as the inclusion of crypto-assets within the scope of the Central Bank’s regulatory and foreign exchange powers.

Finally, according to the Financial Market Commission (Comisión para el Mercado Financiero, “CMF”), the number of debtors in the supervised lending industry, specifically for bank loans, increased from 5,033,545 to 5,348,427 within the period December 2020–December 2021. This increase may be explained by a number of different factors, including the increase in basic living costs, inflation, and excess liquidity and credit during late 2020 and early 2021.

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

There is no discrete information pertaining to local lending transactions but, generally speaking, the largest sector of borrowers is real estate developers, followed by commerce (retail) and construction.

Nonetheless, in the last few years, Carey has advised, among others, the following clients in significant lending transactions:

- A USD 1 billion syndicated loan, with The Bank of Nova Scotia acting as Administrative Agent, granted to Compañía Minera Doña Inés de Collahuasi.
- Mainstream group, in a USD 620 million project finance granted by Inter-American Investment Corp., CaixaBank, DNB ASA, KfW IPEX-Bank and Mitsubishi UFJ Financial Group, for the construction and development of a portfolio of five renewable energy projects.
- The Bank of Nova Scotia, in a USD 165 million financing granted to Corporación del Cobre (CODELCO).

2 Guarantees

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

There are no restrictions for this type of guarantee, provided that certain corporate requirements are followed, depending on the type of company involved, and provided that the guarantor benefits somehow from these operations. This is also subject to applicable insolvency, moratorium or similar laws relating to or affecting creditors' rights generally, as well as general principles of fairness (regardless of whether it is considered in a proceeding in equity or at law).

Additionally, under Chilean general banking law, banks are not authorised to grant mortgages or pledges over their own physical assets, unless to guarantee payment of the purchase price thereof. Considering this, it has been construed that banks can provide guarantees over financial assets, subject to certain restrictions regulated by the CMF.

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

Under the Chilean Corporations Law, directors of corporations are jointly and severally liable for any damages caused to shareholders for their negligent or malicious actions, making it highly unlikely that the approval of a board would be secured for such a disadvantageous operation. Should the agreements cause the company's insolvency, there are actions for revocation which apply once the reorganisation or liquidation procedures have started, according to Chilean insolvency law. Among the agreements that can be revoked are any pledges or mortgages granted by the insolvent company within a year before the insolvency proceedings (to guarantee debts previously acquired), and any act or agreement (including granting guarantees) entered into within two years before the insolvency proceedings, provided that (i) the counterparty knew of the company's poor state of business at the time, and (ii) the agreement caused damage to the other creditors, where damage means that the terms and conditions were distant from the market's at the time of the agreement. On the other hand, article 2,468 of the Chilean Civil Code grants the creditors of an insolvent debtor the right to request the revocation of certain agreements entered into by such debtor (*acción pauliana*), provided that: (i) the transaction causes damages to the creditors (the transaction executed increased the insolvency of the debtor); (ii) the debtor was aware of its poor business condition at the time of entering into such act or contract; and (iii) in case of an onerous act or contract, the counterparty of the debtor was also aware of the poor business condition of the debtor.

2.3 Is lack of corporate power an issue?

Yes. The Chilean Civil Code establishes in its articles 2,151 and 2,160 that the principal shall not be obliged toward third parties by acts or agreements entered into by its agent if (i) the latter did not mention that he was acting on behalf of the principal, and (ii) the agent acts beyond the limits of its mandate. However, this issue is mitigated by the "theory of appearance", based on article 2,173 of the Chilean Civil Code, according to which such

agreements are legally binding for the corporation in case they were agreed upon in good faith by the counterpart, without knowledge of said lack of corporate power. Ratification by the principal of the non-empowered actions is also a possible solution for the lack of corporate power.

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

There are no governmental approvals required, but, depending on the company's structure, the value and the type of guarantee, there are certain corporate consents which are required. If the guarantor is a corporation, in order to guarantee third-party obligations (unless the guaranteed obligations belong to a company that is a subsidiary of the guarantor, in which case the Board's approval suffices, and also with an exception for lender banks) and also if the value of the guaranteed obligations exceed 50% of the guaranteeing corporation's assets, an extraordinary shareholders' meeting must be called in order to grant approval.

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

No. Nevertheless, any operation executed between related parties needs to be for the company's benefit, complying with the market's standards for price, terms and conditions, and also the required approval if the guaranteed value exceeds 50% of the guarantor's assets, as explained above.

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

There are no exchange control regulations. Payment in foreign currency is possible if the parties have agreed such form of payment. In order to enforce a guarantee (as an accessory obligation), it is required that the secured obligations comply with certain requirements, and in case of obligations governed by foreign law and subject to foreign jurisdiction, *exequatur* procedures have to be conducted. Subject to Law No. 18,010 regarding lending operations, transactions agreed in a foreign currency shall be payable according to the seller exchange rate applicable on the date of payment, which must be certified by a Chilean commercial bank. Please refer to our answers to questions 7.2, 7.3 and 7.7 in regard to the enforcement of foreign judgments procedure.

3 Collateral Security

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

Lending obligations can be (i) secured by security granted over collateral, creating rights *in rem*, and (ii) guaranteed by personal guarantees.

- (i) **Security over assets:** There are securities over moveable assets (pledge agreements) and securities over real estate, vessels, and aircraft (mortgage agreements).
 - (a) **Security over moveable assets:**
 - **Civil pledge:** This has a wide scope, as it may apply to any moveable property, including all kinds of personal rights and credits. Any obligation may be secured by this pledge, including obligations to act, or to refrain from acting. However, it is not commonly used, as the pledgor must deliver the pledged asset, losing the ability to use and exploit it.

- **Commercial pledge:** This aims to secure commercial obligations. Though it is very similar to the civil pledge, unlike the latter, the material possession by the pledgee is not required, as it may be delivered to a third-party bailee. With this pledge, it is not possible to secure future obligations – only currently existing and determined obligations – and its only requirement is that the material possession of the pledged property is not held by the pledgor. The Commerce Code requires certain formalities for granting the pledge in order for the pledgee to be able to exercise its right to be paid preferentially: (i) the execution of the pledge agreement by means of a public deed, or by private instrument entered into a Chilean Notary Public's registry; (ii) the amount of the debt secured and the pledged asset must be defined in the agreement; and (iii) for pledges granted over a credit, the debtor of the credit must be notified not to make any payment under the pledged credit but to the creditor.
 - **Banking pledge over securities:** This may be granted over bearer securities of any kind in favour of banks and other financial institutions, even those that are foreign. This pledge may secure all current or future obligations of the pledgor with the pledgee. It only requires the handing over of the instrument by the pledgor to the pledgee. Credits payable to the order (i.e., not in bearer form) must be endorsed as a guarantee to the pledgee. Finally, shares must be pledged by means of a public deed or private instrument, which must be notified to the issuer by a Notary Public. This pledge does not allow the pledgor to remain in material possession of the pledged assets. It is worth noting that the Constitutional Court of Chile ruled in one case that this procedure was not compliant with the due process constitutional protection, thus it declared the same unconstitutional. This is not a general ruling, but it may show a tendency.
 - **Pledge without conveyance ("PwC"):** This allows any kind of corporeal or incorporeal, present or future, moveable assets to be pledged in order to secure own or third-party obligations, present or future, irrespective of whether such obligations are determined or undetermined at the time of the pledge agreement. It must be executed either by means of a public deed or a private instrument, with the signatures of the appearing parties authorised by a Chilean Notary Public, before the instrument is entered into a Chilean Notary Public's registry. The PwC agreement must contain at least the following references: (i) the identities of the parties; (ii) the existing secured obligations or the specification that the pledge secures present and future obligations (*cláusula de garantía general*); (iii) the identification of the pledged assets; and (iv) the determined or undetermined amount to which the pledge is limited or the extent to which the pledge secures several obligations, if applicable. The PwC agreement must be registered in a special registry called the Pledge without Conveyance Registry. Upon its registration, the pledge without conveyance is enforceable upon third parties.
 - **Pledge over deposited securities:** A new pledge was created at the end of 2016 to simplify the pledging of securities deposited with depository entities. The latter shall need to enter into a master agreement with all depositors to allow this type of pledge.
- (b) **Security over real estate:**
- **Mortgages:** Granted by means of a public deed, a mortgage allows not only existing and determined obligations but present and future obligations of the borrower (*cláusula de garantía general*) to be secured. Mortgages are perfected by means of registration in the corresponding Mortgage Lien Registry. Generally, the mortgage deed will also contemplate a prohibition to transfer, convey and enter into acts or contracts with respect to the mortgaged property. Likewise, mortgages can be granted over mining concessions and water rights, which need to be registered in the same manner in the Custodian of Mines' Registry or the Real Estate Registrar Property Registry, as appropriate.
 - **Security over vessels and aircraft:** Mortgages can be granted over vessels and aircraft fulfilling certain requirements, such as the vessel or aircraft being duly registered in the corresponding Registry and the agreement being granted by means of a public deed.
- (ii) **Personal guarantees:** The most common personal guarantees in Chile are sureties (*fianzas*) and joint and several guarantees (*fianzas y codendas solidarias*). By means of sureties, one or more third parties are bound to pay the debtor's obligation in the event such debtor does not pay the secured obligation. By virtue of joint and several guarantees, the liability for default is enforceable directly against all of the debtor(s) and guarantors as a group or against any one of them as an individual at the choice of the enforcing creditor. The main characteristic of the joint and several guarantees is that guarantors become equally liable to the creditor, just as the primary debtor. Therefore, they are not entitled to request that (i) the debt be claimed first from the borrowers and only if they do not pay, then be collected from them, and (ii) the debt be divided equally or proportionally among the various guarantors. Under Chilean law, guarantees are an accessory to the main obligations and cannot exceed the amount of such obligations. This is expressly regulated for sureties, where it is stated that they cannot exceed the main obligation being guaranteed and cannot be granted in terms more onerous than those of the main obligor but can be granted in terms more effective (like securing its obligations as guarantor through a mortgage, for example). The Chilean Civil Code does not provide for any formalities at all to grant sureties but if the obligation intended to be secured is a commercial obligation, it must be granted in writing. Where the guarantor of a surety and a joint and several co-debt is an individual married under joint ownership of the matrimonial estate (*sociedad conyugal*), the prior spouse's consent is required.
- (iii) **Conditional assignments of rights:** This is a widely used tool in Chile to safeguard creditors' rights in an event of default.

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

It is not possible to dispose or grant a security over all of an entity's assets. The security document must clearly identify which assets are being pledged (or mortgaged). Additionally, each type of security requires specific formalities for perfection (see our answer to question 3.1 above). The most advisable manner is to have an agreement for every type of asset, since each has a different registration process.

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

Yes. Please refer to the answer to question 3.1.

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

Yes. Please refer to the answer to question 3.1, since the receivables are credits.

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

Yes, it can be taken either by means of a commercial pledge or a PwC. The procedure is briefly explained in the answer to question 3.1.

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

Yes. All the pledges set forth by Chilean law can be granted over shares. Please refer to our answer to question 3.1. The Chilean Corporations Law states that any liens or rights *in rem* over shares of a company must be notified by a minister of faith, who must leave a record thereof in the company's shareholders' registry. Shares can be issued either in certificated form or dematerialised in case of corporations and companies limited by shares.

However, security over shares or any other assets located in Chile cannot be granted under a New York or English law-governed document, given that, in accordance with article 16 of the Chilean Civil Code, assets located in Chile are subject to Chilean law, notwithstanding valid stipulations made in foreign contracts.

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

Yes. Please refer to the answer to question 3.1.

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

Yes, it can. Please refer to the answer to question 2.4 above.

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

It mainly depends on the kind of collateral the company is granting. Except for civil and commercial pledges, all other collateral agreements must be executed by means of a public

deed or by a private document which must be authorised and registered by a Notary Public. Therefore, notarisational expenses are common to all kinds of collateral over all kinds of assets.

In case of mortgages, as mentioned above, the agreement has to be registered in the relevant Mortgage Lien Registry and in the Prohibitions Registry of the Real Estate Custodian, which charges a fee as well.

In case of a PwC, it is necessary to register it in the PwC Registry, which also charges a fee. If a PwC is granted over shares that are deposited in the Central Securities Deposit, these must be registered in an electronic pledge registry, which also charges a fee for its services.

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

No, expenses are generally not material, and in general, procedures do not take long, although it depends on the registrar and workload at the time of the registration request. The PwC Registry charges a fixed fee of CLP 39,200 (approx. USD 50) for each such registration.

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

No, there are not.

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

No, there are not.

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

Yes; please refer to the answers above. In case of the execution of foreign agreements in Chile, documents must be apostilled (or legalised, if it was extended in a country that is not a member of the Apostille Convention), and if not in Spanish, they need to be translated to be presented in court.

4 Financial Assistance

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

- (a) Shares of the company
There are no such prohibitions or restrictions under Chilean law, except for the requirements mentioned in the answers to questions 2.4 and 2.5.
- (b) Shares of any company which directly or indirectly owns shares in the company
There are no such prohibitions or restrictions under Chilean law, except for the requirements mentioned in the answers to questions 2.4 and 2.5.

- (c) Shares in a sister subsidiary
There are no such prohibitions or restrictions under Chilean law, except for the requirements mentioned in the answers to questions 2.4 and 2.5.

5 Syndicated Lending/Agency/Trustee/Transfers

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

Yes. Their appointment requires the existence of at least two creditors, who may allow the authorities to manage the collateral as well as enforcement and release of the same in case of an event of default, among other duties and attributions. In the case of a single lender, it can also issue a mandate for a local entity/person to act on its behalf, serving the same purpose as a collateral agent with the same powers, although in this case, such mandate will be subject to general rules, but not to the simplified granting and collateral management provisions applicable to the security agent pursuant to Chilean law.

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

Yes. Individual lenders can also issue a mandate for a local entity/person to act on their behalf, serving the same purpose as a collateral agent with the same powers.

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

Yes. Under the Chilean Civil Code, it is necessary to duly notify the credit assignment to the debtor, and for the debtor to accept it. Otherwise, the assignment cannot be enforced against the debtor or third parties.

Regarding the guarantees, the Chilean Civil Code provides that assignment of credits encompasses assignment of guarantees securing the same, by virtue of the law.

In all such cases, if there is a foreign lender lending to a Chilean entity, these international transfers must be reported to the Central Bank of Chile for statistical and monetary purposes.

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

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

- (a) As a general rule, interest paid by Chilean taxpayers to foreign lenders is subject to a 35% withholding tax.

However, a reduced 4% tax rate is applicable to certain interest payments (see question 6.2). The above is notwithstanding the existence of double taxation treaties. The payment of interest by Chilean taxpayers to domestic lenders is not subject to withholding tax.

- (b) Payments of interest abroad upon enforcement of a guarantee could be subject to withholding tax depending on the reimbursement rights that the guarantor has against the main obligor.

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

Interest paid to foreign banks or foreign financial institutions complying with the requirements set by Chilean tax legislation benefit from a reduced withholding tax rate of 4%. Interest payments to foreign individuals resident in a country where there is a tax treaty in place with Chile may also benefit from a reduced withholding tax rate.

Stamp tax applies to documents evidencing indebtedness for borrowed money, including loan documents, notes and bond issuances. The tax is applied over the principal amount of the loan and its current rate is 0.066% of the principal amount multiplied by the number of months-to-maturity of the loan, with a maximum of 12 months (i.e., 0.8%). In case of loans payable on demand, the applicable rate is 0.332%.

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

No, it will not.

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

There are transactional fees and translation costs, but as explained in the answer to question 3.9, they are not significant.

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

Under Chilean income tax law, thin capitalisation rules are triggered when a Chilean-resident taxpayer pays interest or other financing expenses (e.g., services, commissions, expenses reimbursements) to a related party abroad under a withholding tax rate of less than 35%. Per the thin capitalisation rules, according to article 41F of the Chilean Tax Code, any interest (or similar) payments made abroad to a related party and attributed to excessive indebtedness are subject to a 35% tax payable by the debtor. The withholding tax applicable to the payments made by the Chilean resident taxpayer can be used as a credit against such 35% tax.

A taxpayer will be deemed to have “excessive indebtedness” if its total indebtedness (related and non-related) is greater than three times its tax equity at the end of the year when payments were made to related parties.

7 Judicial Enforcement

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

Yes, taking into consideration the existence of a connecting factor with the parties involved. However, according to article 16 of the Chilean Civil Code and article 105 of the Private International Law Code (the “Bustamante Code”), assets are governed by the *lex situs* (the law of the jurisdiction where the assets are located), thus assets of any kind located in Chile are governed by Chilean laws. In consequence, generally speaking, a choice of law of a court in Chile will be based on the *lex situs* of the charged assets.

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

Yes. Chilean courts would enforce an English/New York judgment without re-examination of the merits, provided legal requirements are met and there are no public policy considerations and to the extent the judgment complies with a proceeding called “*exequatur*”, which must be followed before the Chilean Supreme Court.

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

- (a) In general, disputes are resolved in the first instance by a lower court, which may take from two to four years. Rulings and judgments of a lower court may be reviewed in second instance by a Court of Appeals, which may take from one to two years. Beyond that, some remedies may be claimed before the Supreme Court, which may take from one to two years. Therefore, a common civil proceeding may take up to eight years. In addition, enforcement of judgments is generally executed by means of an enforcement proceeding, which may take around one year.
- (b) The *exequatur* proceeding itself may usually take around six to eight months. Once the *exequatur* is obtained, the enforcement proceeding may usually take around one year, although we have obtained payment in a New York-issued ruling in a three-month period.

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

Yes. The enforcement of collateral security located in Chile must be made in Chile, before the competent Chilean court, in

accordance with the rules for the so-called summary proceeding (*juicio ejecutivo*) contained in the Chilean Code of Civil Procedure. This procedure provides a very brief discussion stage, a stage of liquidation and subsequent public auction, which is held by auctioneers appointed by the court. This last stage can take a long time and the proceeds of the auction may be different from the expected ones.

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

No, there are no such restrictions.

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

Yes. According to Chilean insolvency law, during a term of 30 days as of the legal notice of the reorganisation resolution which appoints a supervisor for the insolvency proceeding (“*Veedor*”), the debtor will be protected by the Insolvency Financial Protection (*Protección Financiera Concursal*), during which neither the declaration nor the initiation of a liquidation proceeding against the debtor or foreclosures can take place, nor may individual foreclosures, any kind of executions or restitutions in lease trials be initiated and, among others, all agreements executed by the debtor will maintain their effectiveness and payment conditions. The credits that contravene this restriction will be postponed in payment until all of the creditors have been paid off. This 30-day period may be extended under certain circumstances for two further 30-day periods. Nonetheless, personal guarantees issued by third parties can be foreclosed.

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

Yes. Foreign arbitral awards are recognised and enforced in Chile, subject to an *exequatur* from the Supreme Court, which will be granted provided legal requirements are met and there are no public policy considerations, without re-examination of the merits.

8 Bankruptcy Proceedings

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

Please see our answer to question 7.6 above.

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

According to Chilean insolvency law and the Chilean Civil Code, there is a scale of preference, according to which debts are paid. The first class, which includes judicial costs, administrative and liquidation fees, labour wages, severance payments and surcharge and withholding taxes, has preference over all other credits. The

second class includes the rights of the pledgee over the pledged asset. Mortgagees prefer every other credit, including first class credits, over the mortgaged asset; nevertheless, if there are not enough assets to cover the debts, the first class gives preference to the mortgagee over the mortgaged asset.

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

Banks, and the Republic and its agencies and municipalities, are excluded. Mutual, investment and pension funds are deemed a created patrimony that adopt an independent existence from their owner in order to serve a particular and autonomous purpose; thus, they are not considered a legal entity. Their managers (corporations) might be declared insolvent.

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

No, there are not.

9 Jurisdiction and Waiver of Immunity

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

Yes, it is. Nonetheless, the Republic and its agencies and the Central Bank of Chile have certain restrictions and sometimes they may not submit to a foreign jurisdiction.

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

Yes, it is. Nonetheless, the Republic and its agencies have certain restrictions and sometimes they may not waive sovereign immunity.

10 Licensing

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

There are no licence or permission requirements to perform lending operations in Chile.

11 LIBOR Replacement

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

As to regulatory rules, not much has been implemented, aside from the introduction of Resolution 2416-01-210819 by the Board of the Central Bank of Chile, published in the Official Gazette on 23 August 2021, which added a list of foreign reference rates to those that can be agreed upon in foreign currency agreements with variable rates granted by financial institutions to persons domiciled or resident in Chile. To the existing list, comprising mainly LIBOR and Prime rates, the following were added: SOFR (Secured Overnight Financing Rate); €STR (Euro Short-term Rate); and SONIA (Swiss Average Rate Overnight). These new additions are intended to provide a range of options for the market to choose from as a replacement for LIBOR rates.

Multiple meetings have been held by the Central Bank of Chile, together with banks assisted by Carey, pension funds and key investors, in order to better determine the best course of action regarding LIBOR replacements due to the short-term nature and disparity between many SOFR rates, which still appears to be one of the more commonly suggested options. Advancements have been made, but a definite rate or replacement method has yet to be defined.

On the other hand, market practice has rapidly adapted, including LIBOR replacement formulas and options in credit agreements, as well as transitioning to the use of SOFR in an ever-increasing number of transactions. However, the main problem remains the management of risk for outstanding contracts that reference the LIBOR rate. Such contracts need to be renegotiated and amended, and for cases in which such agreements are not viable, legislation needs to be passed in order to reduce the legal risk for many market participants.

12 Other Matters

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

Due to the formalities required in Chile for the execution of certain documents or perfection of contracts, and the rigid structure by which notaries and public registrars need to abide, the COVID-19 pandemic added significant constraints and delay in closing transactions, as those institutions had to reduce their working hours and apply strict protocols, which in turn led to the accumulation of pending requests. However, those delays are decreasing, as notary working hours have returned to normal, general quarantines have ceased and COVID-19 measures are more manageable.

The Santiago Court of Appeals issued a resolution clarifying what flexibilities notaries may or may not have/implement in their jurisdictions, such as:

- (i) clarifying that notaries may use advanced electronic signature devices provided it is personal and non-transferable, on the days and hours of operation of their notarial office and in relation to verified actions within their jurisdictional territory, in strict compliance with the law and resolutions issued by the Supreme Court of Chile on the matter;

- (ii) regarding the authorisation of public deeds, the notary may only authorise signatures stamped in his presence;
- (iii) the signatures that the grantors stamp on private instruments may be authorised by the notary when it is done in a semi-present way or by telematic means, provided that the remote identity verification is done in a way that guarantees that the notary can attest to the knowledge of or the identity of the signatories;
- (iv) regarding authorisation of signatures stamped on private instruments, in a remote manner, whose authenticity is confirmed by the notary, one should note the following:
 - (a) the use of databases or technological platforms to verify the identity of the signatories or the authenticity of their signatures is permitted, provided that they are of an official nature or that they belong to the notary's office and are of its sole responsibility; and
 - (b) the redirection or derivation of this kind of procedure to private and external platforms or databases is prohibited; and
- (v) the authorisation of electronic signatures stamped on bills of exchange or promissory notes, or on endorsements or protests, is not permitted.

In any case, it has been clarified that the exercise of notarial functions, whether in person or online, can only be carried out within the territory for which the notary has been appointed.

We expect these hurdles to keep declining, though maintaining some of the benefits such as the optional usage of telematic means. Additionally, the extra time required to close deals is accounted for and anticipated when establishing deadlines.

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

There are regulations for the prepayment for local loans, which are not applicable to cross-border loans. Additionally, there is no interest rate limit for loans granted to Chileans by foreign or international financial institutions or banks.



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