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Venezuela

ACQUISITION FINANCE

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This country-specific Q&A provides an overview of acquisition finance laws and regulations applicable in Venezuela.

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VENEZUELA
ACQUISITION FINANCE

1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

Venezuela is a *sui generis* jurisdiction. To understand the Venezuelan situation, we may focus on some aspects that have acutely developed in the last few years:

- The Venezuelan economy shrank in approximately 80% from 2013 to 2020. In the last three years, the economy has grown in single digit numbers, but it is still a very small part of what it was before 2013.
- Venezuela is now coming out of a cycle of **hyperinflation**, which lasted four years, but the accumulated annual rate of inflation between January and November 2023 was 182.9% according to specialized consultants.
- The Venezuelan currency has been the subject of three "**monetary reconversions**": the first was in December 2007, where three zeroes were taken from the bolivar; then in 2018, where five zeroes were taken from the bolivar; and in 2021, where six zeroes were taken from the bolivar. So, a total of 14 zeroes have been taken from the Venezuelan currency since 2007.
- In addition, since February 2003 there have been foreign currency **exchange controls** in Venezuela. From September 2005, exchange transactions outside the regulations were criminalized by successive laws which were amended or abrogated, until on December 30, 2015, the Exchange Controls Decree-Law was promulgated. Foreign exchange transactions outside the regulations were no longer criminalized, but the exchange control regime was very restrictive in many other aspects. In 2018, a "constitutional decree" abrogated the Exchange Controls Decree-Law, however this did not imply the complete end of the foreign exchange control regulations, as evidenced in the Central Bank Law.
- As a result of the above, the Venezuelan banking sector's size has decreased in size and relevance. As described by The Economist in 2019: "The banking sector in Venezuela can claim a strange accolade: it is one of the most dysfunctional sectors in one of the world's most malfunctional and poor-performing economies. Interventionist policies and worsening economic conditions have seen the combined volume of loans and deposits decline by over twenty-fold when measured in dollar terms since late 2012.[1]" Although the general governmental policies have changed since then to a less hostile environment, banks continue to be highly regulated and vulnerable to changes in policies. These factors lead to the lack of credit instruments and funds for the private sector.
- Regarding foreign currency values, since 2019 the Central Bank has let the official exchange rate soar to the level of the unofficial parallel market. A **de facto dollarization** has occurred, which the monetary authorities have tolerated with ups and downs, and this has led to a situation that is difficult to read regarding economic possibilities, however, a muted optimism permeates some economic activities.
- **Price controls** have been in force for many years in Venezuela, leading to problems of scarcity of supplies and corruption. From a commerce and industry perspective, the government had taken important measures to control economic activities, with a very aggressive and confrontational stance against the private sector. However, since 2019, there seems to be a discreet effort by the government, to open certain avenues to private investment and to cease harassing

private sector actors. This effort began with the decriminalization of exchange control violations and is more evident in the laissez-faire attitude to dollarization and in the quiet release of price controls.
- During 2018, the sustained economic crisis affecting Venezuela evolved into a full **humanitarian emergency**, which was aggravated by the covid-19 health crisis, causing the emigration of approximately 7 million Venezuelans (out of 30 million).
- Venezuela is subject to **international sanctions**. These sanctions began in 2015 by targeting individual government officials and later evolved to apply to transactions involving the government, including state-owned companies (now blocked by the sanctions). This gravely affects oil production and commercialisation and, in practice, impedes the negotiation of new debt and dealings on equity belonging to the government of Venezuela or Venezuelan state-owned companies, among
- From a political perspective, the **government controls** all public institutions, including the National Assembly (the Venezuelan parliament), which was elected in 2020, at the date set in the

All these aspects directly affect acquisition finance in Venezuela and need to be set out in order to understand new trends, some of them favourable, which have evolved recently due to internal and external factors. The former include the government's reappraisal of its economic policies, including the acceptance of the de facto dollarization, the de-criminalization of foreign currency exchanges and the flexibilization of price controls. The latter include international developments that have changed the perception regarding international sanctions and the global oil market.

Among those new trends, we may mention three which we deem to be favourable:

- New pragmatic economic policies implemented since 2020, although far from perfect, have improved the situation for doing business in Venezuela.
- On November 26, 2022, OFAC issued General License 41, which increases the activities that Chevron is allowed to perform in Venezuela. More importantly, on October 18, 2023, OFAC issued General License 44, which authorizes transactions involving oil and gas for a six-month period. On the same date, OFAC issued General License 43, which –also temporarily authorized– gold operations in Venezuela, and lifted some restrictions on the trading of Venezuelan bonds. Even though the scope of the authorizations is subject to obvious limitations, one should not underestimate its importance, which has consequences in the Venezuelan economy as a whole, and as regards possible acquisitions related to the oil and gas sector.
- The re-establishment of diplomatic and economic relations with neighbouring Colombia. Again, this is a very important international step in the economic stimulus of Venezuela, not only because of possible new investments, but also because of the revival and reappraisal of actual Colombian investments in Venezuela.
- The promulgation of the Organic Law on Special Economic Zones (LOZEE)[2]. This law is important, not only as of itself, but because of the underlying meaning of the government formally reaching out to private national and international investors.

Footnotes:

[1] https://www.eiu.com/industry/article/1667534950/venezuelas-shrinking-banking-sector/2019-01-10

[2] Official Gazette N° 6.710 of July 20, 2022.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

The banking sector has not escaped the shrinkage of the Venezuelan economy described in question number 1, which by some accounts has reached 80% since 2012. The Venezuelan currency has all but disappeared for major operations, which are transacted in foreign currency, mainly in US dollars and euros. In addition, there are serious limitations to the banking sector's ability to lend money, including the government-issued limit as to the percentage of their holdings that banks may lend (*encaje*), which is currently set at 73%.

Although bank clients may have dollar accounts, these are not treated as normal bank accounts, but as custody agreements, where the bank agrees to simply hold the clients' foreign currency, and it may not be transferred to other clients of the same bank or to other banks.

These (and other) limitations to lending mean that for practical purposes the financing of acquisitions must come from foreign sources or from non-bank lenders, and -in all cases- in foreign currency and not in bolivars.

Further, many of the acquisitions which have closed in recent years have been "distressed" transactions. The long crisis of the Venezuelan economy, price and foreign exchange controls, the hostile local environment, and the international sanctions among other factors, have driven international corporations first to deconsolidate the financial statements of their Venezuelan subsidiaries, and then to look for a way out of the Venezuelan economy altogether. This is not simply a case of closing the company and liquidating its assets, because the government frowns on such strategy and has even criminally persecuted the transnational subsidiaries' officers and attorneys. So many of those transnationals have opted for selling their Venezuelan interests.

From the point of view of the financing of the acquisition, many of these transactions are financed by the acquirers, on private equity operations, and secured by the value of the assets that are being handed over, especially real estate. From the point of view of investors (with a taste for risks), these are very attractive opportunities.

The Organic Law on Special Economic Zones may become a good vehicle for the financing of acquisitions. The law contains specific provisions which seem to grant banks with operations in the zones "an exceptional and preferential fiscal regime", and it expressly states that the economic activities developed in the zones shall be ruled by a system of freely convertible foreign currency. So far, six special economic zones have been created by decree, but none of them include provisions related to the banking sector. These provisions should be further developed in the decree which creates each specific zone or in provisions to be issued by the Ministry of Economy, Finance and Foreign Trade and the Central Bank of Venezuela.

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

There are so many high level risks and concerns regarding the Venezuelan situation, that it is difficult to select specific issues. These are key:

- The general licenses issued within the last year by OFAC, in particular General License 41 (Chevron) and General License 44 (Oil and gas) have been linked to the compliance with the agreements reached in México between the Venezuelan government and its main opposition parties. The failure to comply with these agreements may have very adverse effects on the hoped-for reactivation (albeit limited) of the Venezuelan oil sector, since there have been explicit warnings from the State Department regarding such compliance.
- The government may reinstall the application of price and/or exchange controls. This would directly impact the appetite of acquirers, and the decisions of financers.
- The de facto dollarization that is now in place may disintegrate by government and Central Bank policies. An ominous sign was the reform in February 2022 of the Law of Tax on Large Financial Transactions, in order to tax foreign currency transactions, whatever their amount.
- The inflationary process may again resume its prior proportions. The government is under pressure from education and health public workers to increase salaries, and this may adversely affect inflation numbers. In addition, a presidential election is constitutionally set for 2024, and government spending may increase exponentially, feeding inflation.

4. In your jurisdiction, due to current market conditions, are there any emerging documentary features or practices or existing documentary provisions/features which borrowers or lenders are adjusting or innovating their interpretation of, or documentary approach to?

There are currently no emerging documentary features or practices or existing documentary provisions or features in our jurisdiction that borrowers or lenders are adjusting or innovating in their interpretation or documentary approach.

5. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

The legal and regulatory requirements for banks to be able to act as such, and therefore to provide financing, are mainly established in: (i) the Decree with Rank,

Value and Force of Law of Institutions of the Banking Sector (*Decreto con Rango, Valor y Fuerza de Ley de Instituciones del Sector Bancario*, the "**Banking Law**")[3], where the requirements for the incorporation of banking institutions and the attributions of the regulating entity, the Superintendency of Banking Institutions ("**SUDEBAN**") are established; (ii) the resolutions and circulars issued by the Central Bank; and (iii) the resolutions and circulars issued by SUDEBAN.

In the case of non-bank entities, they are regulated by their own laws, for instance: (i) Insurance sector: the Decree with Rank, Value and Force of Law of the Insurance Activity (*Decreto con Rango, Valor y Fuerza de Ley de la Actividad Aseguradora*)[4], and resolutions and circulars issued by the Superintendency of Insurance Activity; (ii) Capital markets: the Decree with Rank, Value and Force of Law of Capital Markets (*Decreto con Rango, Valor y Fuerza de Ley de Mercado de Valores*)[5] and resolutions and circulars issued by the Superintendence of Capital Markets; and (iii) in the case of individuals, they are regulated by the Civil Code[6] (the "**Venezuelan Civil Code**").

Moreover, the legal and regulatory requirements for banks and non-banks to benefit from security provided for financings, vary depending on the security in question. Nevertheless, these are established in (i) The Banking Law; (ii) the Venezuelan Civil Code, (iii) the Trust Law *(Ley de Fideicomisos)*[7]; and (iv) the Law on Movable Mortgages and Pledge without Displacement of Possession *(Ley de Hipotecas Mobiliarias y Prenda sin Desplazamiento de Posesión)*[8].

Footnotes:

[3] Official Gazette Nº 40.557 of December 8, 2014

[4] Official Gazette Nº 6.220 of March 15, 2016

[5] Official Gazette Nº 6.211 of December 30, 2015

[6] Official Gazette Nº 2.990 of July 26, 1982

[7] Official Gazette Nº 496 of August 17, 1956

[8] Official Gazette Nº 1.570 of February 27, 1973

6. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

As previously expressed, there are serious limitations to the banking sector's ability to lend money. In addition, there are complications implicit in the foreign exchange control regulations. The Banking Law establishes that the Central Bank will settle the terms, limitations and modalities of the banking institutions, currency exchange operations and border exchange operators, authorized to act in said market, in attention to the provisions of the constitutional Exchange Control Agreement Nº 1. At the present time, those banking institutions are not allowed to lend foreign currency in Venezuela, since bank intermediation can only be done in national currency. Further, even the bank clients' foreign currency holdings in Venezuelan banks are not transferrable. Therefore, the sector has decreased significantly in Venezuela, so loans for acquisitions regularly come from foreign banks, under foreign law and jurisdiction, or from private investors also under foreign law and jurisdiction.

7. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

In general terms, there are no limitations for foreign entities to acquire assets in Venezuela. And, as previously expressed, most lenders that finance acquisitions in Venezuela are foreign entities or private sector investors which have different types of restrictions depending on their jurisdiction.

Nonetheless, in Venezuela there are some regulations that limit the ability of foreign entities to acquire assets in our jurisdiction. For instance (i) the Organic Telecommunications Law *(Ley Orgánica de Telecomunicaciones)*[9] establishes that the concessions for the use and exploitation of the radioelectric public domain, shall only be granted to people domiciled in the country; (ii) the Law on Land and Agrarian Development (*Ley de Tierras y Desarrollo Agrario*)[10] prioritizes Venezuelan nationals, who are "preferential beneficiaries", for the allocation of land, so this preference may result in a limitation for foreign entities to acquire land in Venezuela; and (iii) recently, in order to incorporate or file any document at the Commercial or Real Estate Registry, foreign persons must first register themselves at the Autonomous Service of Registries and Notaries (SAREN, for its acronym in Spanish) and, when sending the request, they must also state the reasons why they need to file the document.

Footnotes:

[9] Official Gazette Nº 39.610 of February 7, 2011

[10] Official Gazette N° 5.991 of July 29, 2010.

8. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

Traditionally, debts in Venezuela have been secured by mortgages, pledges and security bonds (*fianzas)*. A 1973 law established two additional instruments: chattel mortgages and non-possessory pledges. Such traditional security interests were devised for simple loans between one lender and one borrower. Since then, the development of the Venezuelan economy, linked to the world through its oil sector, included large and complicated international credit operations. Securing such financings has been a constant challenge. The traditional methods raise several problems when they are used to secure syndicated loans; and they are rigidly regulated by law, especially regarding enforcement, since the secured assets must be sold by a judge in an auction, following a strict procedure. However, international lenders expect to have the collateral sold without judicial intervention and controversies to be submitted to a jurisdiction other than the borrower's. Therefore, lenders have relied mainly on security interests established abroad, which do not adequately cover assets in Venezuela, in particular, real estate.

Our firm, MENPA – Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía., in the 2000s, devised a different approach to security interests, by means of security trusts implemented in accordance with Venezuelan legislation, used initially for the Sidor debt restructuring (steel industry) and then in the Hamaca (oil sector) and Digitel (telecommunications) project financings. Since then, security trusts have been used in most of the important financings dealing with Venezuela, regarding the assets located in Venezuela.

A peculiarity of the Trust Law is that the trustee must be a Venezuelan bank or insurance company. However, given the rigidity of traditional security mechanisms, there are many advantages to a security trust, with regard to cost, formalities of registration, jurisdiction and enforcement. One of the issues under a traditional security mechanism, such as a mortgage, is that the secured person must be a direct creditor of the borrower who must be identified in the corresponding loan document. This raises obstacles to securing directly the rights of bondholders or syndicated banks, whose intention may be to transfer their rights.

Another way of solving this issue in syndicated loans or bond issues was the use of a small group of banks to be appointed as "lenders of record", to hold the security for the indirect benefit of all the non-registered lenders or bondholders. However, given the rigid structure of securing mechanisms in Venezuela, many problems may arise for the lender of record structure, whereas in a security trust the beneficiary may be the agent.

In some recent "distress" transactions, we have seen no formal security mechanisms. In in most of those cases the real estate owned by the target company is a reserve value; and there have been instances where the sellers retained a right to repurchase after a period has passed.

9. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

In our jurisdiction, traditional security interests (mortgage, pledge, chattel mortgage and non-possessory pledge) must be created over a specific and properly identified property. As stated above, in many transactions over assets in Venezuela, the security interest is granted under foreign law. In general terms, the formality of granting security interests in Venezuela is quite rigid and mortgages and pledges must be granted over specific assets. Security interests in assets must be filed in the Real Estate Registry; and pledged assets must be delivered to the creditor.

Our Civil Code establishes that (i) there can only be mortgages on **specifically** designated property, and for a **specific** amount of money; and (ii) under a pledge contract, the debtor gives his creditor **an asset**, which must be returned when the obligation is extinguished, granting the creditor the right to be paid with privilege on the pledged asset. This privilege only applies when there is a document detailing, among other things, the pledged asset.

Under The Law on Mortgages over Moveable Assets and Pledges without Transfer of Possession (*Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento de Posesión)* (the "**Special Mortgage and Pledge Law**"), there is a legal limitation as to the assets that can be subject to the chattel mortgage and non-possessory pledge.

It is for the previously exposed reasons that traditional security interests in Venezuela cannot be "universal" (over all the debtor's assets). Security trusts, which are more flexible, must be granted over specific assets, the ownership of which is transferred to the security trustee.

So, as stated above, in many transactions over assets in Venezuela, the security interest is granted under foreign law.

10. Do security documents have to (by law) include a cap on liabilities? If so, how is this usually calculated/agreed?

In bond security documents (*fianzas*), the bond cannot exceed what the debtor owes, nor can it be constituted under more onerous conditions. Nonetheless, taking, as a rule, the above, bond security documents do not have to (by law) include a cap on liabilities. If the obligation has not been limited to a certain amount, the guarantor is bound only up to the amount of the principal debt.

In pledge documents, the amount owed must be declared. If it is unknown, its maximum must be indicated and, if this is not possible, at least its source or cause must be expressed.

Mortgage documents must include a cap on liabilities. An obligation and its accessories can be guaranteed, but it is necessary to include the amount on the document. Thus, in the case of mortgages constituted to guarantee the payment of a sum of money, the respective interest rate must be included in the document.

Regarding chattel mortgages and non-possessory pledges, the document must determine the maximum amount for which the secured asset responds. In security trusts, the amount being secured must be established.

11. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

Bond agreements in civil law are consensual and do not require any formality, but in the case of commercial bonds, they must be written and incorporated before the Commercial Registry; mortgages must be filed with the Real Estate Registry (the fee could be up to 2% of the secured amount); pledges require the actual delivery of the pledged asset to the creditors or their appointee, and must be granted by a written agreement[11]; chattel mortgages and non-possessory pledges' formalities vary depending on the creditors in whose favor the guarantee in being established. For example, by direct authorization of the law, chattel mortgages and non-possessory pledges can be constituted in favor of the government, banks and insurance companies. Moreover, governmental authorization is required for foreign banks, companies, and natural persons. Regarding chattel mortgages and non-possessory pledges, registration in the Real Estate Registry is required, for a fee of a small percentage of the secured amount; lastly, security trusts (including the trustee's acceptance) must be authenticated before a public notary, and the transfer of real estate assets must be filed before the Real Estate Registry.

The timing of the incorporation of any document varies depending on the registry but can take several months.

Footnotes:

[11] Although a written agreement is formally only required for objects whose value exceeds a certain amount, such amount has long been outdated, therefore, all pledges must be written.

12. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions or prohibitions.

There are no limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in our jurisdiction.

13. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

In the current Venezuelan situation, registry officials tend to charge arbitrary amounts in order to register the transfer of properties and/or guarantees. The amounts irregularly charged usually exceed those established by law, and the user ends up having to negotiate the registration fees (and these other charges) with registry officials. Therefore, there may be other notable costs, which -however- are very uncertain (and they also vary depending on the Registry and the type of document to be granted).

14. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of

acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

There are strict limitations regarding the acquisition of a company's own shares. Firstly, any share acquisition must be authorized by the company's shareholders meeting. The shares may only be paid with sums coming from profits regularly obtained, according to the balance sheet. In no case is the company allowed to make loans or advances with guarantee of its own shares.

Secondly, companies that are registered in the National Securities Registry (*Registro Nacional de Valores*) may only acquire their own shares or those issued by their parent company, or other securities that confer rights over them, when the following conditions are met:

1. That the acquisition is previously authorized by the shareholders meetings of the acquiring company.
2. That the shares are fully paid.
3. That the amount of the acquisition does not exceed the amount of the profit sections not affected by the law or by the bylaws of the acquiring company, according to the consolidated financial statements of the parent company.
4. That the nominal value of the shares acquired, added to the value of those already owned by the parent company and its controlled companies, does not exceed fifteen percent of the paid-in capital, represented in common shares issued by the parent company.
5. That the acquisition is made through a stock exchange.

The above limitations will be applicable, even if the acquisition is made through intermediaries or trust companies. Thirdly, companies registered in the National Securities Registry may not set up trusts, advance funds to third parties, grant them guarantees, or provide them with any type of financial assistance for the acquisition of shares issued by the company that contributes the resources or by its parent company.

15. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible (and if so, please briefly describe the procedure and how long it will take)?

There is currently no special procedure available.

16. If there are financial assistance issues in your jurisdiction, is it possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) and if so it is necessary or strongly desirable that the different types of debt be clearly identifiable and/or segregated (e.g. by tranching)?

Yes, under Venezuelan law it is possible to grant guarantees and/or security for debts other than pure acquisition debts, as there is no legal provision explicitly prohibiting it. In principle, any type of debt can be guaranteed. It is advisable to identify or segregate each type of debt and its corresponding guarantees and/or security.

17. Does your jurisdiction recognise the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

The use of trusts as security mechanism, as well as the concept of security agent or security trustee are not explicit in the Venezuelan Trust Law. However, the rules governing trusts are sufficiently broad to allow trust property to be used for any lawful purpose, including its use as a security mechanism. In fact, the security trust designed by our firm for the 2000 Sidor debt restructuring was the first security trust over project assets in a syndicated loan in Venezuela, and the security trusts we designed for the Hamaca and Digitel transactions were the first trusts of their kind in the oil and telecommunications sectors. Our firm has written on that matter.[12]

An essential aspect of trusts in Venezuela is the transfer of the ownership over the trust assets to the trustee and the duty of the trustee to perform all acts necessary to achieve the purpose of the trust. Thus, as the trustee is the legal owner of the trust property, he could, subject to the provisions of the trust deed, sell the trust property and deliver the proceeds to the beneficiaries (who could be the trustor's creditors), without judicial intervention. In the situation described above, the trustee would be acting as a security trustee.

As mentioned above, under the Trust Law, trustees must be Venezuelan banks or insurance companies.

Footnotes:

[12]http://www.menpa.com/archivos/72f20dbb8a0fa21eb773The%20Use%20of%20Trusts%20as%20Security%20Mechanisms%20in%20Recent%20Financings%20in%20Venezuela.pdf

18. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or assets is a foreign entity)?

The closest concept to a security agent in Venezuelan law is a trustee. Therefore, we will refer to the trustee's restrictions. In this regard, the Banking Law (articles 74 and 75) and SUDEBAN's resolution N° 083.12 establish some prohibitions for banks that act as trustees, among the following which are worth mentioning:

- The total amount of fiduciary funds may not exceed five times the trustee's patrimony.
- To provide any security bond (*fianza*), guarantee (*aval*) or security (*garantía*) to the trustor in relation to the results of the trust or of transactions, acts and contracts performed by the trustor with the trust property.
- Under any circumstances, guarantee returns on funds received in trust.
- To act as trustee for natural persons or legal entities related to the respective banking institution.
- To carry out operations, acts and contracts with the trust property, for the benefit of: (i) the institution itself; (ii) its directors and employees, and the employees hired for the trust in question; (iii) its external auditors, including the professional partners of the external audit firm and the professionals involved in the external audit work of the institution itself; (iv) the spouse and close relatives of the aforementioned persons, as well as legal entities in which the spouse and close relatives jointly hold more than fifty percent (50%) of the shares.
- To carry out the following transactions with the fiduciary funds: (i) granting credits, unless they are granted to the beneficiaries; (ii) granting security, pledging or otherwise encumbering the trust fund without the express authorisation of the trustor, beneficiary or trustee; (iii) conducting transactions with companies or institutions located or domiciled in tax havens; etc.

19. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

To transfer a loan, it must be assigned or sold. The debtor must receive a notice or accept the transfer in order for the assignee to have rights against third parties (articles 1549 and 1550 of the Civil Code). The benefit of the associated security package is transferred with the loan since the transfer includes the accessories, such as guarantees, privileges or mortgages (article 1552 of the Civil Code).

20. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination provisions survive the insolvency of a borrower incorporated in your jurisdiction?

Generally speaking, the following traditional security interests may be granted over specific assets in Venezuela: (i) ordinary mortgages (*hipotecas*) and pledges (*prendas*) under the Civil Code and the Commercial Code; and (ii) chattel mortgages (*hipotecas mobiliarias*) and non-possessory pledges (*prendas sin desplazamiento de posesión*) under the Special Mortgage and Pledge Law. Additionally, security trusts may be granted over the debtors' assets, where ownership of such trust assets is transferred to the security trustee; therefore, the debtor may not grant other security interest over such assets which are no longer his property.

Under Venezuelan law, mortgages (excluding chattel mortgages) are the only security interest that may concur over the same asset. The rules that govern the

priority of mortgages are enshrined in the Civil Code, which grants priority to mortgagees in order of registration, that is, the registration of the mortgage will determine its rank ("**First-to-file priority rule**"). The ranking of mortgages sets the order in which the mortgages will be paid in the event of a judicial auction.

The ranking of mortgages comes from a mandatory rule of the Civil Code that cannot be relaxed by private agreements; thus, mortgagees cannot agree on a method of subordination other than the First-to-file priority rule. However, the Civil Code explicitly provides the possibility of assigning a mortgage, but only up to the extent of the assignor's credit, so that the assignor's rank will be transferred to the assignee. According to the jurisprudence of the Civil Cassation Court of the Supreme Tribunal of Justice, the registration of the assignment is required for its legal existence.

It should be borne in mind that in Venezuela (i) the objective prerequisite for bankruptcy is the cessation of payments of the debtor, not his/her insolvency; and (ii) in the event of bankruptcy, the rules governing bankruptcy do not establish any difference between subordinated debts and unsubordinated debts, so there is a high risk that a bankruptcy judge will only take into consideration the distinction between secured debts and unsecured debts, provided in the Commercial Code, ignoring any contractual subordination provisions.

21. Is there a concept of "equitable subordination" in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated in your jurisdiction are subordinated by law upon insolvency of that company in your jurisdiction?

No, Venezuelan law does not provide a concept for "equitable subordination". However, there is a position that subordination could be granted by Venezuelan bankruptcy judges, in a very limited manner, when they decide, in accordance with articles 1005 and 1006 of the Commercial Code, the observation or contradiction that any of the creditors had made of the loan at the time of its qualification.

22. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

Venezuelan law recognizes and applies the clauses relating to the choice of foreign law as the governing law of the contract. In fact, Venezuelan Law on International Private Law (*Ley de Derecho Internacional Privado*)[13] establishes that contractual obligations are governed by the law chosen by the parties.

In addition, the Venezuelan Law on International Private Law includes provisions for submission to a foreign jurisdiction, which may be express or tacit:

- Express submission must be written, requiring, for such purposes, the handwritten signature of the parties (particularly of the party to whom the submission is opposed).
- Tacit submission shall result (i) for the plaintiff, from the fact of filing the complaint; and, (ii) for the defendant, from the fact of performing during the trial, personally or through counsel, any act other than declining jurisdiction or opposing a preventive measure.

The above rules of submission to a foreign jurisdiction do not apply in the following matters, where Venezuelan jurisdiction shall apply: (i) disputes relating to property rights over real estate located in Venezuela; (ii) when there is no possibility of settlement or compromise; (iii) when the essential principles of Venezuelan public order are affected; and, (iv) in the case of public interest contracts.

Furthermore, Venezuela ratified the Code of Private International Law ("**Bustamante Code**"), and did not reserve the provisions relating to sovereign immunity (articles 333 to 339 of the Code). Consequently, as a general rule, foreign states may exercise their sovereign immunity and may also waive it.

Lastly, our jurisdiction enforces foreign judgments, provided that they are subject to a declaration of enforceability (*exequatur*). The rules governing the enforcement of foreign judgments and awards are established in (i) the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, which was ratified by Venezuela; and (ii) the Venezuelan Law on Private International Law.

Footnotes:

[13] Official Gazette N° 36.511 of August 6, 1998.

23. What are the requirements,

procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

The procedures, methods, requirements and restrictions will vary depending on the type of security interest involved.

Venezuelan law provides for specific procedures in this matter: (i) the Venezuelan Code of Civil Procedure (*Código de Procedimiento Civil Venezolano*) establishes special procedures for judicial foreclosure of mortgages and pledges; and (ii) the Special Mortgage and Pledge Law establishes the procedures for judicial foreclosure of chattel mortgages and non-possessory pledges.

These aspects are key in these legal procedures:

- As a general rule, creditors that hold traditional security interests cannot sell the secured assets, nor deliver any document otherwise evidencing the transfer of such assets; instead, they must resort to a judicial auction in order to have the assets sold and collect the proceeds of the sale.
- These procedures must begin with a request or a complaint from the secured creditor, respectively.
- The request or complaint must be accompanied by specific documentation, both public and private, which may vary depending on the type of security interest involved. For instance, specific certifications from the Real Estate Registry are required in order for the request or complaint to be admissible in foreclosure and chattel mortgage procedures.
- These procedures include deadlines for the debtor's summons, his/her voluntary compliance and his/her opposition to the secured creditor's claim.

In the case of security trusts, the security trustee may, under the terms of the trust deed and as legal owner of the trust assets under Venezuelan law, sell the trust assets and deliver the proceeds to the beneficiaries (the trustor's creditors), without judicial intervention.

24. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

Regarding insolvency, the Venezuelan Commercial Code establishes two statutory procedures: moratorium (atraso) and bankruptcy (quiebra).

Moratorium procedure is a benefit that the law grants to those debtors who, due to a lack of liquidity caused by non-foreseeable events, need to delay all payments to their creditors. For a moratorium to apply, the debtor's assets must necessarily exceed its liabilities. The key features of the moratorium procedure are the following (i) the directors and officers of the debtor continue to manage the debtor's business; (ii) the duration of the moratorium may be granted for up to twelve months, which is the longest period allowed by law, and that period may be extended for twelve additional months under certain circumstances; (iii) the court shall appoint some creditors to integrate a committee that will be in charge of monitoring the management, administration, and liquidation of the debtor's assets; (vi) the debtor may enter into any arrangement with creditors in order to receive additional benefits.

If the court denies the petition requesting a moratorium, it must declare that the debtor is in bankruptcy. Even if the moratorium petition is granted, the court may revoke such moratorium and declare the debtor to be bankrupt, provided (i) one or more debts have not been disclosed by the debtor; (ii) one or more of the debts and/or credits or assets reported by the debtor do not really exist; (iii) the debtor does not comply with its obligations concerning the management, administration and liquidation of its assets; (iv) the debtor has been acting in bad faith; or (iv) the assets belonging to the debtor are not sufficient to cover all its debts, or at least 2/3 of such debts. In addition, if the judge reaches the conclusion that the debtor has ceased payments of its obligations, then the moratorium will end and the bankruptcy procedure will begin.

The Venezuelan bankruptcy procedure is not a benefit and is intended to liquidate the debtor's assets, not to rescue or restructure the debtor. In fact, the bankruptcy rules were conceived in order to allow all those creditors who do not benefit from a security interest, to try to obtain pro rata payments, through the orderly sale of the debtor's assets, who will cease its business operation.

In case a petition for bankruptcy is initiated by one or more of the creditors, the bankruptcy court, in view of the documents presented by them, may issue an injunction in which it may (i) order the taking of judicial possession over all of the assets; books and documents of the debtor; (ii) order the taking of judicial possession over all the correspondence addressed to the debtor, and (iii) order the prohibition of making payments and delivering goods to the debtor.

The most important consequences of the bankruptcy declaration are that (i) the debtor may no longer manage or dispose of its own assets, nor enter into any

agreement with respect to them, because the administration of such assets will be in charge of the syndic on behalf of the creditors; (ii) the non-matured debts of the debtor become immediately due and payable; (iii) the debtor's unsecured debts will not accrue interests; (iv) the debtor's secured debts will continue to accrue interests, but the payment of such interests can only be made with the results of the sale of the secured assets; and (v) certain acts of the debtor, done to the detriment of the creditors prior to the declaration of bankruptcy may be considered to be null and void.

25. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

Yes, entering into a bankruptcy or moratorium proceeding will most likely result in a significant delay for secured lenders to recover their loans. The Commercial Code rules governing bankruptcy are outdated and inflexible, having been in place for over a hundred years without any reform, and, moreover, bankruptcy procedures usually take several years due to their complexity and the lack of background and infrastructure of bankruptcy judges to attend properly to bankruptcy cases, so the end result is frequently disappointing for the creditors.

In practice, bankruptcy and moratorium proceedings are not appropriate for dealing with the problems that arise in modern cases of insolvency or near-insolvency.

However, in the case of security trusts, since the assets are no longer owned by the debtor, they do not form a part of the debtor's patrimony, unless their ownership was transferred to the security trustee during the suspect period referred to below.

26. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

In brief, under Venezuelan laws, payments to creditors are made in the following order:

- Creditors with a special absolute privilege: Venezuelan law grants "absolute" preference to certain creditors, which have priority over all other creditors in the collection of their claim. In this sense, labour-related claims and tax claims are, in that order, preferred over all other claims, including credits arising from other privileges and legal preferences, such as mortgages.
- Creditors with privilege: By law, certain creditors have priority over all other creditors ("**Privileged Creditors**"), except for those with a special absolute privilege. There are numerous causes of privilege, all of which arise by law. In this regard, the rules of the Civil Code governing the order of priority among Privileged Creditors must be applied. If Privileged Creditors do not obtain full payment of their credits through the sale of the debtor's assets, they shall concur with unsecured creditors for the remaining amount of their credits.
- Creditors with privilege over chattel mortgage and non-possessory pledges.
- Creditors secured with mortgages.
- Unsecured creditors.

Consequently, creditors with special absolute privileges and Privileged Creditors (depending on the type of security interest), will have priority in insolvency proceedings over secured lenders.

The case of the creditors under a security trust is different, since the assets are no longer within the patrimony of the debtor, and thus are not subject to the priority mechanisms described here.

27. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

According to article 936 of the Commercial Code, a judge is allowed to consider that the cessation of payments started up to two years before the date said judge declares the debtor is bankrupt. This term of up to two years is referred to as the suspect period (*período sospechoso*). According to article 945 of the Commercial Code, the following transactions are null and void, if they take place after the date the debtor is deemed to have ceased payments or within a ten-day period preceding such date: (i) any transfer of assets without any consideration in return; (ii) the constitution of any security interest; (iii) any payment of non-matured debts; and (iv) any payment in cash of matured debts to be paid in kind, as well as any payment of matured debts, to be paid in kind, paid through the delivery of a bill of exchange or any other negotiable document. Further, according to article 946 of the Commercial Code, any payment of matured debts is null and void, if it takes place after the date the debtor ceased

payments, that is, during the suspect period, provided the payee is aware of the cessation of payments. The same may apply to any other act detrimental to any of the creditors, even if there is a consideration in return. The transfer of assets under a security trust may also be suspect if made during the suspect period.

Creditors have at their disposal a special type of Pauline or revocation action (*Acción Pauliana o revocatoria*) applicable to bankruptcy ("**Bankruptcy Pauline Action**"), so that certain debtors' fraudulent transactions are not enforceable against them.

In this sense, the Bankruptcy Pauline Action may be exercised for the following debtor's transactions: (i) disposal of property free of charge (*enajenación de bienes a título gratuito*); (ii) judicial and contractual mortgages (*hipotecas judiciales y convencionales*) antichresis rights (*derechos de anticresis*), pledges and any privileges or cause of preference in payment, granted on the debtor's assets, for debts contracted prior to the ten days following the debtor's cessation of payments; (iii) debt payments not yet due; (iv) payment of overdue debts, effected in a form other than money or negotiable instruments, if the obligation was payable in money; and (v) any payment of overdue debts made by the debtor and any act of the debtor for consideration performed after the cessation of payments and prior to the bankruptcy judgment, if those who received from the debtor or contracted with him/her knew of his/her status when such acts were made.

Furthermore, there is a limitation period for bringing the Bankruptcy Pauline Action, that extends up to one year from the date on which it is proven that there is no agreement -between the debtor and his/her creditors- (*convenio* or *concordato*). Such agreement must be discussed and approved in a duly constituted meeting of creditors with a bankruptcy judge´s intervention.

28. Are there any other notable risks or concerns for secured lenders in enforcing their rights under a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

The main concern regarding the enforcement of security interests in Venezuela is that, under Venezuelan law, creditors that hold traditional security interests cannot sell the secured assets, nor deliver any document otherwise evidencing the transfer of such assets. This is done by a judge, in a public auction, following a procedure, which begins with a request to the court presented by the mortgagee or pledgee assisted or represented by its attorney, after which many steps must be taken, before such public auction can actually take place. These procedures usually last for years and their outcome may not be favourable for the creditor, who may not obtain full repayment from the proceeds of the public auction, because of prices fluctuation in the current Venezuelan real estate market.

With regard to creditors under a security trust, as explained above, the situation is different, since ownership of the trust assets is transferred to the security trustee when the trust is granted and the trustee may dispose of such assets in accordance with the trust deed upon the default of the debtor.

29. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance, including if any withholding tax is applicable on payments (interest and fees) to lenders and at what rate.

There is no specific tax for national lenders to pay because of loans in the context of acquisition finance. Nonetheless, charges for authentication or registration services in the cases of mortgages or guarantees must be paid. The income that can be generated from the loan is subject to the ordinary income tax (*impuesto sobre la renta)*, which is subject to the Income Tax Law[14]. If the lender is domiciled in the country, this income may be also taxable with municipal taxes, which usually vary between 0,25 and 3% of gross receipts.

In the case of security trusts, the taxes and duties applicable to the transfer of ownership of the trust assets apply (of which real estate transfer taxes and duties are the most significant).

30. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

Net gains from loans and credits granted by foreign financial institutions are taxed at the rate of 4.95%, established by article 52 from the Income Tax Law[15]. Also, interest payments, when made to foreign lenders, are subject to withholding. Moreover, foreign lenders should be aware of the more than fifteen double taxation treaties Venezuela currently has with different jurisdictions, from which they could benefit from specific rules, but it depends on where the foreign lender is from.

These double taxation treaties are mostly inspired by the Organization for Economic Co-operation and Development (OECD) models.

Footnotes:

[15] Official Gazette Nº 6.210 of December 30, 2015

31. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

The previously mentioned Commercial Code, the Decree with Rank, Value and Force of Law of Capital Markets (*Decreto con Rango, Valor y Fuerza de Ley de Mercado de Valores*) and the regulation issued by the National Securities Superintendence, including the Rules on Public Offers for the Acquisition, Exchange and Takeover of Public Companies (*Normas Sobre Ofertas Públicas de Adquisición, de Intercambio y Toma de Control de Sociedades que hacen oferta pública de acciones y otros derechos sobre las mismas*)[16].

Footnotes:

[16] Official Gazette Nº 37.039 of September 20, 2000.

32. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

Before the announcement, the bidder has to notify the National Securities Superintendence ("**SUNAVAL**"), at least five trading days in advance, of the date on which it wants to make the announcement and send a specific report with the offer (the "**Takeover Report**"). Then, SUNAVAL has five trading days to authorize such an announcement. The term of validity will be determined by the bidder, but it will not be less than 20 nor more than 30 trading days, from the effective start day, and the target company must send its observations to the report no later than the fifth trading day following the announcement.

The withdrawal of the offer is revocable at any time up to the effective start day. Then from the effective start date and up to three trading days before its closing, and up until the payment of the operation only if there had been a resolution from SUNAVAL that opposed or conditioned the operation.

The offer's result must be notified to SUNAVAL within two trading days following the closing of the offer, and the liquidation of the operations derived from the acceptance will take place no later than the fifth trading day following the closing of the offer.

33. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

The technical minimum acceptance condition required by the regulatory framework should be established by the bidder in the Takeover Report. If the bidder has expressly reserved the right to forgo the minimum acceptance condition, it may do so, provided the acceptance of the offer is of at least 75% of the shares that the bidder initially offered to acquire.

34. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

The bidder, along with the other shareholders of the target, if any, can (i) pass special resolutions, (ii) de-list the target and (iii) cause the target to grant upstream guarantees and security in respect of the acquisition financing once the liquidation and payment derived from the acceptance of the offer have occurred, that is, when the bidder has completed the takeover process and acquires control over the company. Unless the bylaws of the company specify otherwise, the amount of votes in order to pass the aforementioned motions is established in the Commercial Code and in the special regulations regarding the subject, including the Rules Relating to the Public Offering, Placement and Publication of Securities Issuances (*Normas Relativas a la Oferta Pública, Colocación y Publicación de las Emisiones de Valores*)[17].

Footnotes:

[17] Official Gazette Nº 41.745, of October 24, 2019

35. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

When the bidder establishes payment in cash, the bid must be guaranteed through trusts, bonds, letters of credit or any other guarantee. In any case, a

commitment of a “joint bond” (Fianza Solidaria) must be given from all collateral bidders and from all related persons who are considered a bidder according to Venezuelan regulation, in favour of any person who has accepted the offer.

36. What conditions to completion are permitted?

The conditions to completion permitted are the ones established in the Takeover Report.

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