



ICLG

The International Comparative Legal Guide to:

Lending & Secured Finance 2016

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A practical cross-border insight into lending and secured finance

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Costa Rica

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1 Overview

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

The most recent report from the World Bank on Doing Business shows that Costa Rica moved from 90th position to 7th position (an increase of 83 positions in only one year) in the Getting Credit Index of this report. This particular index measures the scope, access and quality of credit in a particular country. This rise in the ranking is a result of several regulatory changes that have recently been approved such as, but not limited to, the enactment of the Moveable Guarantee Law (“*Ley de Garantías Mobiliarias*”) which we will refer to below, as well as the enactment of the Banking System for Development Law (“*Ley Sistema de Banca para el Desarrollo*”) which grants access to the lending markets to small and very small enterprises and/or entrepreneurs which previously did not have access. Notwithstanding the above changes, it should be noted that Costa Rican economic growth has seen a slight slowdown in comparison to 2015; interest rates have begun to decrease due to a recent change in the methodology established by the Costa Rican Central Bank (“*BCCR*”), and as a result, it is expected that financial institutions’ profits may be affected in the near future. As indicated before, we expect that local banks and financial institutions will continue to generate innovative products and services that try to add value to the regular personal and corporate loan business they conduct.

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

As transpired in 2014 and most of 2015, the most significant lending transactions that have taken place in Costa Rica have been related to infrastructure projects. In this area, there are several important projects such as: the San Jose-San Ramon Toll Road which is currently being negotiated and funded; a World Bank financing to the local health authorities (“*Caja Costarricense del Seguro Social*”) for several health-related projects such as the digital medical file and several new hospital constructions; and the Moin container terminal currently being built in the province of Limon by Netherlands-based APM Terminals. In addition, several large-scale hydro electrical plants and wind farms are in the midst of being completed during 2015 by the state-owned *Instituto Costarricense de Electricidad*.

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)?

Yes, it can. However, there should be no limitation to undertaking such act or contract in the company’s corporate statutes or by-laws. Notwithstanding the above, and assuming that the corporate statutes or by-laws establish no limits, in order to comply with corporate mandate rules established in articles 1262 and 1263 of the Costa Rican Civil Code, the guaranteeing company shall hold an Extraordinary Shareholders’ Meeting in which it analyses the terms and conditions of the transaction and authorises its legal representative (or any other person) to act on behalf of the company in order to authorise the guarantee of the borrowings of that related third party (a member of its corporate group or an independent third party company).

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?

Pursuant to Costa Rican laws, if a company intends to guarantee or secure related third party borrowings, it is required to show or justify a benefit or expressly indicate that it shall receive a financial retribution in some way. As indicated in question 2.1 above, in order to comply with corporate mandate rules, the company should analyse such retribution (whether small or significant) and expressly authorise its legal representative, by means of an Extraordinary Shareholders’ Meeting, to represent the company in such act or contract.

2.3 Is lack of corporate power an issue?

Yes. All corporate undertakings must be executed by a legal representative of the company with sufficient power or else duly authorised – by the company’s shareholders in a duly held shareholders’ assembly – to execute the corresponding act or contract. If there is a lack of corporate power by the legal representative, then the act or contract may be rendered null and void. In addition, if a guarantee is subject to registration and the legal representative’s power or authorisation is not duly recognised, then the guarantee will not be properly recorded and as a result the guaranteed party may be negatively affected. The corporate powers for legal representatives are governed pursuant to Title VIII of the Costa Rican Civil Code.

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

Under Costa Rican laws, government filings or consents for granting guarantees are not required. With regard to shareholder approval, this will be subject to the limitations (if any) that the company and/or its legal representatives may have in its corporate statute or by-laws. If there are no registered limitations to the corporate statute or by-laws, shareholder approval is not required for guaranteeing its own borrowings, as long as the legal representative has sufficient corporate power to execute the corresponding act or contract. As indicated in question 2.1, this shareholders' approval shall be required for guaranteeing the borrowings of its own shareholders and/or officers of the company, and it is also required for borrowings of third parties. If there are registered limitations or restrictions to the corporate statute or by-laws and/or limitations or restrictions to the appointment of legal representatives, then as established in question 2.3 above, the shareholders' approval is also required.

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

Under Costa Rican laws and regulations, this is not a requirement. Nevertheless, upon granting a guarantee to a lender, the debtor should not be in a critical financial position that could be considered a technical insolvency affecting other lenders. Any acts or contracts executed under a technical insolvency may render those acts and contracts null and void. Upon the confirmation of a company's insolvency, acts or contracts executed up to six months prior to that confirmation (of insolvency) may be presumed null and void. Despite the above, local banks and/or financing entities that are subject to supervision by the Financial Entities Superintendence ("*SUGEF*") are obligated to comply with the *SUGEF* 1-05 Regulations, whose intended purpose is for banks and financing entities to quantify their clients' credit capacity and related risks and force them to establish the corresponding solvency safeguards.

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

No. There are no obstacles of this sort in order to enforce a guarantee. As a matter of fact, the Organic Law of the Costa Rican Central Bank ("*Ley Orgánica del Banco Central de Costa Rica*") specifically authorises private and public entities and/or individuals to enter into and execute private and public agreements using a foreign currency.

3 Collateral Security

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

Based on the definition of collateral as "*property that is pledged as security against a debt or property subject to a security interest*", the following are some collateral available to secure lending obligations in Costa Rica: mortgage or common mortgage ("*hipoteca*"); pledge ("*prenda*"); mortgage certificate ("*cédula hipotecaria*"); trust agreement ("*fideicomiso de garantía*"); and moveable guarantee ("*garantía mobiliaria*"). These types of collateral shall be explained in detail below.

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?

Yes, it is possible. In Costa Rica, trust agreements (also referred to as guarantee trust agreements) are usually used as a general security agreement in which real property (fee simple), concession rights, moveable assets, machinery, equipment and assignable rights can be transferred or assigned by the debtor or a third party (also referred to as the "Trustor") to a designated third party identified as a Trustee. The Trustee shall hold the title of the assets or rights placed in trust as a collateral guarantee towards the lender (also referred to as the "Beneficiary") and shall execute the Trust Agreement according to the instructions expressly indicated in such document. It is required that the instructions established in the Trust Agreement follow certain minimum due process rules of procedure.

The transfer of assets or rights to the Trustee can be executed by means of a private agreement, with the exception of registrable assets such as real property and certain vehicles and machinery, which have to be transferred through a public deed ("*escritura pública*") executed exclusively by a Notary Public.

Upon the occurrence of an event of default by the debtor or Trustor under the Trust Agreement or the other loan documents, and failure to cure or at least take specific actions to cure the default, the Beneficiary shall give written notice of the default to the Trustee and to the debtor or Trustor. If the debtor or Trustor fail to timely cure the event of default within the term granted in the Trust Agreement for this purpose, the Trustee shall proceed to execute the auction of the trust estate.

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

Yes. Collateral security can be taken over real property (fee simple) and moveable assets such as any type of plant, machinery, equipment, inventory, fungible goods as well as assignable rights.

The most common type of collateral security over real property is through a mortgage, in which the debtor provides a property as a security to guarantee a specific loan. The lender and debtor agree on all terms and conditions, such as, but not limited to, mortgage grade, lender's name, debtor's name, loan amount, term, advance payment penalty, interest, loan currency, place of payment and the usual contractual clauses that will govern the loan and the mortgage. The mortgage lien – granted through a public deed before a Notary Public – is imposed over the registered real property and has to be recorded before the National Registry. The mortgage entry will be recorded on the property's ownership entry and will be publicly available.

Another type of security over real property is by means of a mortgage certificate. This security has the same legal force as a common mortgage. The National Registry issues the mortgage certificate that identifies the amount for which the certificate is issued and, unlike the common mortgage where there is an established lender, these certificates may be transferred by endorsement. In such cases, the mortgage certificate is also recorded as a lien on the property's ownership entry.

With regard to moveable assets, the most common type of collateral security is the pledge. All moveable assets that are legally subject to an auction and judicial prosecution may be pledged to secure or guarantee a loan. Like mortgages, the pledge agreement must include certain terms and conditions such as: lender's name; debtor's

name; loan amount; term; advance payment penalty; interest; loan currency; place of payment, and the characteristic contractual clauses that will govern the financing. The pledge lien imposed over registered or registrable moveable assets shall be granted through a public deed before a Notary Public and recorded at the National Registry. Moveable assets which are non-registerable can also be granted as collateral pursuant to the Moveable Guarantee Law. This type of collateral is executed by means of a private document and recorded at the Moveable Guarantee Registry. This moveable guarantee provides more flexibility to the parties in order to be able to receive other types of moveable assets as collateral and register that collateral in a verifiable registry. In addition to the above-indicated collateral security (mortgage and pledge), as indicated in question 3.2 above, another type of security is the trust agreement.

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

Pursuant to Costa Rican law, a pledge collateral security can be taken over receivables as well as any other debt or credit. In order for the pledge to have legal value, it is required for the debtor to deliver or assign the receivable to the lender by way of a formal assignment, who is automatically appointed legal depositary (free of charge) of the receivable.

The lender shall not be allowed to dispose or take control of the collateral without the express consent of the debtor. Any agreement that violates the above shall be considered null and void. It is customary to execute this pledge before a Notary Public in a public deed and/or a private document and register the security before the Moveable Guarantee Registry.

In addition, collateral security can be taken over these types of documents through a trust agreement. As established above, the receivable shall be transferred to the Trustee, who shall execute the Trust Agreement according to the instructions expressly indicated in such document.

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

Although a pledge collateral security can be taken over cash deposited in bank accounts in the same way as a receivable (see question 3.4 above), this is not common practice unless the lender is the same bank that grants the loan, manages the bank account and receives such security. The procedure is the same as the one established above.

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, collateral security can be taken over shares in companies (whether a Corporation (“*Sociedad Anónima*”) or Limited Liability Company (“*Sociedad de Responsabilidad Limitada*”). The most common way to take security over shares is through a pledge, which has to be executed according to Costa Rican Law. In the case of Corporations (which have shares in the form of certificates), in order for the pledge to have legal value, it is required for the debtor to deliver the share certificates to the lender, who is automatically appointed legal depositary (free of charge) of the share certificates. In the case of Limited Liability Companies (which shares, called

“*quotas*”, are not in a certificate form), in order for the pledge to have legal value, it should be registered in the company’s Quota Holders Registry Book, and the Quota Holders should approve it through a Quota Holders General Assembly.

The lender shall not be allowed to dispose or take control of the shares unless the established execution process is followed. In order for this execution to be valid it should follow the established due process. Any agreement that violates the above due process shall be considered null and void. Nevertheless, in case there is a non-fulfilment on behalf of the debtor, the lender can enforce the security either through a court of law or through a private executor (“*corredor jurado*”) and recover regular and delayed payment interest.

In addition, collateral security can be taken over shares through a trust agreement. As established above, the shares are transferred to the Trustee, who shall execute the Trust Agreement according to the instructions expressly indicated in such document.

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

Yes, collateral security can be taken over inventory. Inventory in Costa Rica is described as the moveable assets that a person or entity holds for its sale or lease in the due course of its normal business activity, such as raw materials and/or goods required for transformation into sellable assets. As indicated in question 3.3 above, any moveable asset that is legally subject to an auction and judicial persecution may be pledged to secure or guarantee. These types of assets may also be subject to the registration as a moveable guarantee under the special registry for these types of assets. Taking into consideration that inventory is a moveable asset, it is subject to a pledge collateral security as indicated above. In addition, inventory can be transferred to a trust agreement as established in question 3.2 above.

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, a company can grant a security interest in order to secure both its obligations as a borrower under a credit facility and as a guarantor of the obligations of another borrower under a credit facility.

However, as established in question 2.1 above, in order to comply with corporate mandate rules established in articles 1262 and 1263 of the Costa Rican Civil Code, if the company grants a security interest as a guarantor of obligations of other borrowers, it is the guaranteeing company which shall hold an Extraordinary Shareholders’ Meeting in which it analyses the terms and conditions of the transaction and authorises its legal representative (or any other person) to guarantee the borrowings of a third party (a member of its corporate group or an independent third party company) on its behalf.

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

In Costa Rica, the notarisation, registration, stamp duty and other fees are established pursuant to the following legislation: (i) National Registry Tariff Law No. 4564; (ii) Notarial Code No. 7764; and (iii)

General Tariff for Fees for Law and Notary Public Professionals No. 36562-JP. In this regard, depending on the act or contract that is being executed, there is a standardised cost for the notarisation and registration of security. In all instances, if the act or contract has an estimated amount, such fees and stamps are proportional to the estimated amount. If for some reason the amount cannot be estimated, then the fees and stamps will be subject to the type of act or contract and type of security taken.

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?

The time required to execute a specific security shall ultimately depend on the type of security. For example, registration of a mortgage, mortgage certificate or pledge over registered or registrable assets before the National Registry shall take approximately eight (8) working days, taking into consideration that no formal or draft errors are identified by the National Registry.

With regard to expenses, it also varies on the type of security. In general, a security that is subject to registration (see question 3.11 below) will usually have filing and registration expenses that range between 0.60% and 2% of the estimated amount. Security that is not subject to registration will usually have filing and notification expenses that range between 0.15% and 1% of the estimated amount.

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

No specific regulatory consents are required with respect to the creation of security. However, some securities such as a mortgage or a pledge over registered/registrable assets require registration before the National Registry and, as a result, certain legal and regulatory requirements need to be met in order to register such collateral security. If these securities are not registered, then they are not going to be applicable to/enforceable on third parties. Nevertheless, consent is not required.

In addition, certain specific concessions (i.e. maritime zone concessions located under certain legal frameworks such as the *Polo Turistico de Papagayo*) may require administrative consent with respect to the creation of security.

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

When dealing with revolving credit facilities, it is customary to guarantee the total amount of the facility with a type of secured collateral such as mortgage, mortgage certificate, pledge or trust agreement. As established in question 8.1, creditors with these types of collateral shall have a privilege over non-secured creditors.

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

Pursuant to Costa Rican laws and general practice, most securities are executed through a public deed before a Notary Public. Notarised documents such as public deeds ("*escritura pública*") are subject to very detailed formalisms established in Notarial Code No. 7764, and the Notary Public in charge of such execution shall comply with documentary formalities and strictly follow corporate mandate rules (see questions 2.1 and 2.3 above). Notwithstanding

the above, in recent years the trend has been to liberalise loans from these general formalities in order to grant more access to credit and financing possibilities.

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

The Costa Rican Code of Commerce establishes that a company cannot purchase shares of its own capital stock, unless the purchase is made with funds obtained from the company's gross profits from its legally approved balance. Thus, a company cannot finance or borrow money to purchase its own shares. As a result, a company is restricted from guaranteeing or supporting borrowings for the purchase of shares of the same company. In any case, a company is legally limited to own more than 50% of its own capital stock.

(b) Shares of any company which directly or indirectly owns shares in the company

There is no specific prohibition or restriction for a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of shares of any company which directly or indirectly owns shares in the company.

(c) Shares in a sister subsidiary

There is no specific prohibition or restriction for a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of shares in a sister subsidiary.

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?

When dealing with syndicated loans, Costa Rica will recognise the role of an agent who will hold the security in its name and on behalf of the remaining lenders. In this regard, it is important to clearly establish in the financing documents the role of the agent within the syndication and the rules that it shall follow for the repayment of the loan, execution of the collateral, communication with the borrower, etc.

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?

A trust agreement is an alternative mechanism to that of the syndicated loan in which an agent is not recognised. In the trust agreement, the Beneficiaries shall be all the lenders; the Trustor shall be the borrower

and/or that who provides the collateral; and the Trustee shall be a third party which receives the assets in trust and holds them (see question 3.2). Under Costa Rican laws, there can be several Beneficiaries or lenders, as well as several Trustors or borrowers. Upon enforcement, the trust agreement shall clearly stipulate who shall be responsible to execute the instructions under the trust agreement, which should always be a representative of the Trustee.

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?

Assuming there is no limit to assign or transfer the loan from Lender A to Lender B, in order for the assignment or transfer to be valid and enforceable against the borrower, the borrower must be duly notified of the assignment of the loan. In addition, it is important to certify the date of the assignment through a public deed granted before a Notary Public (“*fecha cierta de la cesión*”). The assignment will be valid to third parties from the moment it is certified pursuant to the above.

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?

According to the Costa Rican Income Tax Law, interest payments made by Costa Rican corporations or entities to foreign lenders or financial institutions, as a result of the repayment of any loan, are subject to a 15% withholding tax in Costa Rica. If such interest payment is made to a foreign lender that is part of a bank group that is supervised locally, there is a withholding tax that ranges from 5.5% to 15%. In addition, if such interest payments are made by Costa Rica corporations to multilateral banks, development banks or other non-profit financial entities, the above-indicated withholding tax shall not apply.

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?

Please see question 6.1.

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?

Costa Rica has a territorial tax system; thus, if a foreign lender grants a loan from abroad to a company established in Costa Rica, income generated through that loan or guarantee or grant of security shall not be taxable in Costa Rica. Nevertheless, as established in question 6.1 above, the remittances of interest may be subject to a withholding tax, depending on the type of entity.

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.?

Generally, other than the established withholding tax indicated above, lenders do not assume any other cost in order to grant a loan and secure such loan in Costa Rica. As established in this document, most collateral is executed through a Notary Public in a public deed that is usually registered before the corresponding Section of the National Registry. These costs, which are more specifically referred to in question 3.10 above, are always assumed by the borrower.

6.5 Are there any adverse consequences to 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 purposes of this question.

No. There are no adverse consequences.

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?

The courts in Costa Rica shall always recognise a governing law in a contract and enforce that contract, unless the specific subject matter goes against a public policy law (“*ley de orden público*”) that strictly prohibits such subjection to foreign law.

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. However, the following requirements have to be met: (a) the foreign judgment has been legalised by means of the Apostille Treaty or through the Costa Rican Consulate and translated into Spanish; (b) the foreign courts have followed the established due process; (c) the subject matter of the foreign judgment was not tried in a Costa Rican court; (d) there is no former adjudication or *res judicata* on the same case by a Costa Rican court; (e) the rights declared in the foreign judgment are subject to execution in the forum where the judgment was rendered; and (f) the rights declared in the foreign judgment do not go against Costa Rican public policy laws.

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?

In general terms, if the default under a loan agreement has been well established, the time to prepare and file a lawsuit is immediate.

In order to obtain a judgment, assuming that the debtor raises procedural issues, an approximate time would be 6 to 10 months, minimum. In addition, enforcement of the judgment against assets of the company can take an additional four months.

If we assume that all the legal requirements of the foreign judgment are in place, enforcement of such judgment in Costa Rica can take approximately 6 to 10 months.

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?

Under Costa Rican laws, some of the most important restrictions which impact the timing and value of enforcements are when it is required to serve notice of the commencement of the legal proceeding. This first step in an enforcement case can be cumbersome and delay the proceeding. Once this is executed in accordance with due process and the established notification laws, there are no consents that might delay the process. Notwithstanding the above, the most recent notification laws have significantly reduced the notification process, making the entire enforcement process less problematic.

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 restrictions that apply to foreign lenders.

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?

Upon declaration of bankruptcy, a moratorium on interest payments is declared to all borrowings not secured by means of a mortgage, mortgage certificate, pledge or similar. Although this moratorium does not apply to secured lenders, they cannot demand payment of the interest until the assets have been auctioned and proceedings paid.

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. Please see question 7.2.

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?

Under Costa Rican law, lenders who have collateral security such as a perfected mortgage, pledge, mortgage certificates or trust agreement shall have a privileged right to enforce their security over unsecured creditors. The above-indicated statement applies as long as the perfection of the security is not declared judicially fraudulent. In any event, any collection procedure that the lender executes shall be brought before the same civil court where the bankruptcy proceeding is taking place.

Our law establishes a specific remedy (“*Acción Pauliana*”) in order to request the nullity of any act or contract that has been executed up to two years prior to the declaration of bankruptcy which might affect unsecured creditors. In such case, the administrator of the bankruptcy shall have the power to begin such remedy action and the unsecured creditors may assist in such action.

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?

There are certain limited debts and obligations that have preference with respect to security. These have to be declared by a judge and the resulting liens are also known as legal mortgages which are established such as unpaid taxes, duly executed homeowners’ association fees and some administrative charges. In this regard, these types of obligations have a priority with respect to the security.

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

There are only certain legal entities not subject to bankruptcy. These include the Government of Costa Rica, all public and autonomous institutions, local municipalities and State-owned banks.

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

Yes, there are several processes other than court proceedings available to seize the assets of a company during enforcement. Under most trust agreements, in which assets are transferred to the Trustee to hold them in trust to secure an obligation, upon the occurrence of an event of default by the debtor or Trustor (according to the terms and conditions of the trust agreement or the other loan documents) and failure to cure or at least take specific actions to cure the default, the creditor – also referred to as the Beneficiary – shall give written notice of the default to the Trustee and to the Trustor. If the Trustor fails to timely cure the event of default within the term granted in the trust agreement for this purpose, the Trustee shall proceed to execute the auction of the Trust Estate. The trust agreement shall establish the rules to hold a private auction of the entrusted assets and, if there are no offers to the auction, the Trustee shall have the power to transfer the entrusted assets to the creditor or Beneficiary.

For a pledge agreement in which certain moveable assets are taken as collateral security (see question 3.6 above), upon an event of default, the lender can enforce the security through a private executor (“*corredor jurado*”) and recover regular and delayed payment interest.

In addition, if a security contains an arbitration or conciliation clause, this process may be followed in order to seize – with the consent of the borrower – assets of a company.

In any case, under Costa Rican laws it is strictly prohibited for creditors to immediately seize assets of a company upon non-fulfilment of the terms and conditions or an event of default such as lack of payment. This immediate seizure is also known as “*pacto comisorio*”. All documents and processes shall refer to an execution process (whether private or public, judicial or non-judicial) where due process is followed. Any agreement that violates the above shall be considered null and void.

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?

A party's submission to a foreign jurisdiction is legally binding and enforceable under the laws of Costa Rica, unless there is a public policy law ("*ley de orden público*") that strictly prohibits such avoidance of domestic laws.

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

Generally, yes.

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? 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?

Lenders – whether local or foreign – do not need to be licensed or authorised in Costa Rica or in their jurisdiction of incorporation in order to be able to grant loans in Costa Rica. In addition, there

are no eligibility requirements for lenders to local entities or individuals. Nonetheless, as indicated in question 2.5 above, local banks and/or financing entities that are registered in Costa Rica and as a result are subject to supervision by *SUGEF*, are obligated to comply with certain provisions such as *SUGEF* 1-05, among other local supervision regulations.

11 Other Matters

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

Although foreign lenders do not require authorisation to grant loans in Costa Rica, they shall have a corporate identification number ("*cédula jurídica*") in order to be identified as the lender in the financing documents to be registered at the corresponding Section of the National Registry. This corporate identification number is granted by the National Registry and it does not generate any legal or tax consequences.

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