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Andorra
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ANDORRA

Law and Practice

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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

The Principality of Andorra ("Andorra") is home to an important financial industry, which contributes decisively to the national economy. In turn, the financial industry is dominated by the banking sector, with a few key players (the five operating banking groups) that carry out banking and financial activities in the framework of a universal banking model offering a comprehensive range of services (focused on retail and private banking), which accounts for roughly 20% of the Andorran Gross Domestic Product (according to the most recent data published by the Andorran Banking Association).

The proximity and interconnection between the Andorran financial and banking sector and the adjacent European countries, as well as the increasing trend observed in capital markets transactions carried out by local banking entities, determined the progressive implementation of relevant European banking and financial legislation since the entry into force of the Monetary Agreement with the European Union (EU). Pursuant to this Monetary Agreement, Andorra undertook to implement, from time to time, a substantial part of the EU financial legislative framework, as set forth in the Annex to such Monetary Agreement.

Recent Impacts

The impact of recent economic cycles and the process of regulatory convergence developed by Andorra have affected the direction and trends of its local market, albeit in a reduced extent compared with other neighbouring jurisdictions. According to the 2018 Annual Report of the Andorran Banking Association ("*Associació de Bancs Andorrans*"), the total volume of credit investment rose to EUR5.911 billion, with an NPL ratio of 6.19% and an aggregate ratio over liabilities of 50%.

The evolution of the aggregate gross credit investment of the Andorran banking sector has experienced a slight downwards trend since 2012. This decline – mainly observed in 2016 and 2017 – coincided with the adoption of the International Norms of Financial Information (NIIF) and the beginning of the implementation of European banking and financial legislation in accordance with the Annex to the Monetary Agreement entered into with the European Union in 2011 (eg, insurance and anti-money laundering regulations).

In addition, the process of regulatory convergence with the European banking/financial legislation currently carried out by Andorra and the total implementation of the Basel III framework affected local credit investment activity, which is dominated by local banking groups with a multi-jurisdictional presence.

Supervision of Banking Entities

In this light, Act 35/2018, December 20th, on solvency, liquidity and prudential supervision of banking entities and investment companies ("Solvency and Liquidity Act" – "*Llei 35/2018 de solvència, liquiditat i supervisió prudencial d'entitats bancàries i empreses d'inversió*") – which adapts Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRDIV) and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR) – is a key milestone for the evolution of local credit investment players, which have had to work to improve their balance sheets due to regulatory requirements and administrative adaptation efforts.

1.2 Impact of the COVID-19 Pandemic

The SARS-CoV-2 outbreak, known as COVID-19, has caused a health emergency in the Principality of Andorra and exceptional measures of temporary nature were adopted by the Andorran Government in order to mitigate its negative impact on the economy and the society at large.

The Act of exceptional and urgent measures for the health situation caused by the pandemic SARS-CoV-2 (the Omnibus Act), was approved by the General Council on 23 March 2020. The main target of the Omnibus Act was to curb the first effects that the health crisis was causing people and companies in the Principality of Andorra according to principles of solidarity and co-responsibility. To the extent that the Omnibus Act foresaw temporary measures and the COVID-19 outbreak continued beyond April 2020, a second array of economic measures were approved pursuant to the Act 5/2020, of 5 April 2020 (the Omnibus Act II).

Hence, together with measures related to employment, social security, tax and administrative deadlines, the Andorran Government approved a special package of soft loans ("*crèdit tous*"), guaranteed and with an interest rate of between 0.1% and 0.25% fully assumed by the Andorran Government and channelled through the Andorran banking entities, of a maximum amount of EUR130 Million, intended to finance companies and business (ie, the Andorran Government approved a second package of EUR100 Million on 20 May 2020).

1.3 The High-Yield Market

The local high-yield market is minor, so has played a modest role in the emerging trends of the local loan market. This is due to a variety of factors, but it is worth noting that Andorra does not yet have any comprehensive capital markets legislation in place, that local banking entities are in a sound financial position (aggregate solvency and liquidity ratios of 20.30% and

61.83%) and, as far as is known, that all capital markets transactions carried out in Andorra to date have reached – or exceeded – investment grade rating (BBB – Standard & Poor's and Fitch, or Baa – Moody's).

It remains to be seen whether the global (rising rate environment) and specific Andorran economic outlook (rated BBB-A2 by Standard & Poor's), coupled with the expected development of integral capital markets legislation, will lead to a further increase in local high-yield market activity.

1.4 Alternative Credit Providers

The Andorran loan market has not seen a significant growth in alternative credit providers, so its terms and structures have not been affected.

Please note that lending activity is a reserved activity in Andorra and, therefore, only financial entities (banking entities – "*entitats bancàries*" and non-banking financial entities of specialised credit – "*entitats financeres no bancàries de crèdit especialitzat*") that are authorised to do so by the local regulator (Andorran Financial Authority – "*Autoritat Financera Andorrana*") can carry out lending activities, which encompasses:

- the granting of loans and credits, including, in particular, consumer credit and mortgage credit;
- factoring with or without recourse;
- the financing of commercial transactions (including forfeiting); and
- leasing and non-financial leasing (renting) with or without purchase options.

In conjunction with the small size of the Andorran loan market, this regulatory regime has traditionally raised scarce interest among local players in entering the local credit market. Nevertheless, there has been an increase in cross-border financing operations during recent years, which have funded the development of local projects – usually on a syndicated basis, but also on a standalone basis – by granting financing to local banking entities.

1.5 Banking and Finance Techniques

Overall, the core credit investment activity is focused on financing the acquisition of real estate assets (normally the purchase of a first residence by Andorran residents) and commercial activity (credits and credit lines, among others).

However, in respect of banking and finance techniques, it is possible to see an upward trend strengthening consumer financing; in particular, 2018 set the tone for the outset of capital markets transactions aiming at diversifying financing sources and extending the maturity of banking entities' passive balance sheets.

In connection with this, the first structured covered bonds issuance in Andorra was carried out during 2016 and 2017 as a transaction dually governed under English and Andorran law, with the first EUR100 million tranche rated above investment grade by Fitch Ratings (BBB+) and listed in the Irish Global Exchange Market (GEM).

It is reasonably likely that further capital markets transactions will take place from this year onwards, so as to allow local lenders to diversify their financing sources and in turn boost their real-economy financing capacity. Additionally, some business acceleration programmes for entrepreneurial projects in the consolidation and/or growth phase have been developed in Andorra. However, funding activities associated to these initiatives must only be carried out by licensed local entities.

1.6 Legal, Tax, Regulatory or Other Developments

The main regulatory developments that have had an impact on the loan market in Andorra have been the Solvency and Liquidity Act and the NIIF (See **1.1 Impact of Regulatory Environment and Economic Cycles**).

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

Under Andorran laws, the provision of financing to a company incorporated in Andorra is a reserved activity (lending) that can be carried out exclusively by specific financial entities (banking entities – "*entitats bancàries*" and non-banking financial entities of specialised credit – "*entitats financeres no bancàries de crèdit especialitzat*") that are authorised by the local regulator to do so (activity reservation regime).

Obtaining Authorisation

The administrative procedure to obtain prior authorisation to operate either as a banking entity or as a non-banking financial entity of specialised credit is set out in Act 35/2010, June 3rd, on the authorisation regime for the creation of new Andorran operating entities) "*Llei 35/2010, del 3 de juny, de règim d'autorització per a la creació de noves entitats operatives del sistema financer andorrà*"). Overall, this procedure encompasses the following phases.

Building a deposit

The building up of a non-remunerated deposit before the AFA in the amount of EUR3 million for banking entities and EUR200,000 for non-banking financial entities of specialised

credit (as proof of the applicant's solvency and the seriousness of the application), to be returned to the applicant within different timeframes upon the rejection or approval of the application.

Submitting an application
The submission of an application must be accompanied with specific documentation, including:

- articles of association;
- basic activity programme;
- exposition of the provision of activities pursuant to the promotion of the Andorran economy and the patronage of educational and cultural activities;
- interim statement of the members of the first management body; internal regulation of the conduct of the entity's members; means and plans detailing the manner in which the entity will comply with the applicable legislation – including information about the basic programme of activities for banking entities;
- description of envisaged resources to comply with the organisational and functional requirements of the legislation and investor protection rules;
- detailed description of activities to be outsourced;
- generic description of measures envisaged to guarantee adequate internal control of procedures and to develop the activities in an adequate security environment;
- description of the policies and procedures in relation to the legislation on the fight against money laundering and terrorist financing;
- envisaged relations/bonds with other financial entities;
- the planned location for the registered office;
- a vision of personnel recruitment for the first three years of activity;
- regulatory business plan, including the entity's constitution balance, balance sheets and profit and loss accounts for the first three exercises;
- policies on the implementation of results;
- description of the interim relationship of general direction members; and
- an affidavit of the person who will carry out the role of general director).

Incorporation
After the approval of the submission and the granting of prior authorisation by the AFA, there is a maximum period of three months in which to incorporate the banking entity or the non-banking financial entities of specialised credit in the form of a public limited company ("*societat anònima*"), and to provide the AFA with additional specific documentation – the incorporation deed referring to the availability of a minimum share capital of EUR5 million for banking entities and EUR2 million for non-banking financial entities of specialised credit, fully subscribed by cash contribution.

After Authorisation
The AFA would grant the definitive authorisation upon the submission of this documentation, which shall be published in the Official Gazette of the Principality of Andorra ("*Butlletí Oficial del Principat d´Andorra*"). In assessing the application for incorporating these financial entities, the AFA will assess the application according to the soundness of the project from a financial perspective and weighting, generally speaking, the contribution to the Andorran economy and, particularly, to its financial system (stability and investors' protection).

Other Organisational Requirements
In addition to obtaining prior authorisation as stated above, banking entities and non-banking financial entities of specialised credit must comply with the organisational requirements established by Act 7/2013, May 9th, of the regime for the operational entities of the Andorran financial system and other provisions that govern financial activities in the Principality of Andorra ("*Llei 7/2013, del 9 de maig, sobre el règim jurídic de les entitats operatives del sistema financer andorrà i altres disposicions que regulen l'exercici de les activitats financeres al Principat d'Andorra*"), and Act 8/2013, May 9th, which covers the organisational requirements and operating conditions of operating entities in the Andorran financial system, investor protection, market abuse and financial securities agreements ("*Llei 8/2013, del 9 de maig, sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercat i els acords de garantia financera*"). In synthesis, such requirements refer to the following:

- incorporation as a public limited company ("*societat anònima*");
- designation of a specific corporate name ("*entitat bancària*" or "*banc*" for banking entities and "*entitat financera -no bancària- de crèdit especialitzat*" for non-banking financial entities of specialised credit);
- the location of the registered office within Andorra;
- determination of the specific company purpose;
- funding of minimum share capital;
- the composition of the board of directors (minimum of five members for banks and three for non-banking financial entities of specialised credit who fulfil suitability requirements, are of sufficient good repute, possess sufficient knowledge, skills and experience to perform their duties, and are able to act with honesty, integrity and independence of mind); and

- the composition of the general management (in particular, there is an incompatibility between the roles of the board of directors' president and the general director).

Solvency and liquidity

Banking entities and non-banking financial entities of specialised credit must also comply with the solvency and liquidity ratios (generic ratios of 8% and 100% respectively), and establish banking governance requirements (which are adapted to comply with requirements set out in CRDIV and the latest EBA and ECB Guidelines – EBA/GL/2017/12 and European Central Bank May 2018 Guide to fit and proper assessments) and internal controls regarding risk management, compliance and internal audit functions, conflict of interest policies, client assets and customer protection provisions, as well as the marketing regime.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

Foreign lenders are restricted from granting loans directly to Andorran residents (natural or legal persons, such as a merchant or an individual), as lending activities carried out within Andorra qualify as reserved activities, the execution of which is subject to obtaining prior authorisation from the local regulator (activity reservation regime).

Nevertheless, due to the limited size of the Andorran financial market and its particularities (mainly, the absence of a lender of last resort), the local regulator has traditionally allowed a tolerated market practice that has garnered a consolidated track record in Andorra, under which foreign lenders are allowed to grant financing to local banking entities on a cross-border basis without breaching the activity reservation regime.

3.2 Restrictions on Foreign Lenders Granting Security

The granting of security or guarantees by local entities to foreign lenders is not restricted or impeded in any manner. However, depending on the nature of the secured assets (real estate or company shares), foreign lenders may need to obtain prior foreign investment authorisation ("*autorització d'inversió estrangera*") in accordance with the provisions of Act 10/2012, June 21st, on Foreign Investment ("*Llei 10/2012, del 21 de juny, d'inversió estrangera al Principat d'Andorra*") to enforce their claims against Andorran guarantors and take ownership over secured assets, after carrying out an enforcement proceeding within Andorra (before an Andorran court or following a notarial enforcement procedure) to acquire ownership over real estate assets in Andorra or more than a 10% stake in the relevant Andorran company.

3.3 Restrictions and Controls on Foreign Currency Exchange

The laws of Andorra do not provide for any restrictions, controls or other concerns regarding foreign currency exchange. Exchange rules therefore tolerate free transfer of funds denominated in a foreign currency from a local entity banking account to a foreign lender account held in any other country, for instance.

3.4 Restrictions on the Borrower's Use of Proceeds

There are no restrictions on the borrower's use of proceeds from loans or debt securities, although any requirements arising from anti-money laundering regulations under Act 14/2017, June 22nd, on fighting and preventing money laundering and terrorism financing ("*Llei 14/2017, del 22 de juny, de prevenció i lluita contra el blanqueig de diners o valors i el finançament del terrorisme*") in concert with its implementing regulation(s) should be complied with by any Andorran financial entity ("*entitat operativa del sistema financer*").

3.5 Agent and Trust Concepts

Please note that Andorra has not ratified the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition. "Agent" and "trust" are not recognised concepts under Andorran laws, which expressly forbid the creation and use of trusts and other opaque structures preventing the identification of ultimate beneficiaries.

Alternative mechanisms to trust/agent structures are common in Andorra, with the most widely used being the designation of a local representative in Andorra, who is granted powers of attorney by the foreign lender to carry out the full range of securities-related actions (inter alia, taking legal actions and carrying out enforcement proceedings before Andorran courts and appropriation/seizing procedures over secured assets located in Andorra).

Moreover, recourse to parallel debt provisions (ie, a specific provision provided by the borrower recognising an additional debt in favour of the security agent appointed, independent from the debt owed by borrowers to the lender(s) with a reciprocally connected discharge statement) would be recognised under Andorran laws, as would a parallel debt security package.

3.6 Loan Transfer Mechanisms

The main loan transfer mechanisms available under Andorran laws are assignment, sale and novation.

Assignment
The assignment ("*cessió*") of loans qualifies as a generic legal business conducted through diverse contractual-transfer mechanisms, which provides the transfer over the totality or partiality of rights and obligations from the transferor (assignor) to the transferee (assignee). As a general rule, the assignment of loans does not require any particular mandatory formalities or requirements; however, in an assignment of mortgage loans (such as a transfer of a mortgage loans portfolio between local banking entities), the assignment of receivables shall be made by an agreement raised into the status of a public deed before a notary public.

Please note that, under Andorran laws, the notification of the assignment of loans is not mandatory, but it is recommended so as to prevent the exercise of the transferee's set-off right, which may be exercised against the amounts due to the transferor/assignor until the notification of such assignment is received. Under an assignment of loans, the specific security package set up (normally encompassing the incorporation of mortgage(s) and pledge(s)) may be transferred along with the loans by means of such assignment, although the exclusive transfer of specific loans is also permitted (this will normally be determined by the scope of the transaction and the nature of the mortgage loans).

Sale
The sale ("*venda*") of loans (normally structured as performing or non-performing loans portfolios) is a specific legal business that determines the transfer of the full contractual position (rights and obligations) of the transferor (seller) to a transferee (purchaser) on specific loans (ie, the selling of all rights, benefits and obligations arising out of the loans sold). The sale of loans is commonly carried out through highly bespoke sale and purchase agreements (SPA), which are adjusted to the specific characteristics and factors of the portfolio (composition, guarantees, portfolio quality, etc) and the contractual parties. The specific security package may also be transferred along with the loans by means of such assignment, although the exclusive transfer of specific loans is also permitted (again, depending on the scope of the transaction and the nature of the mortgage loans).

Novation
Contractual novation ("*novació*") also performs the transfer of rights and obligations to the loans in an analogous manner as set out above, pursuant to the sale of loans; however, the novation mechanism encompasses two consecutive steps: first, the termination of the contractual relationship between the transferor and the transferee (borrower), and subsequently the creation of a new contractual relationship between the transferee and the borrower.

3.7 Debt Buy-Back
Debt buy-back transactions are not common in Andorra, with none taking place currently nor in recent years, as far as is known. Debt buy-back transactions directly carried out by a borrower or a sponsor would be permitted under Andorran laws as long as they are carried out in a manner that does not qualify as a financial activity.

3.8 Public Acquisition Finance
Under Andorran laws there are no specific legal rules or generic principles on "certain funds" provisions for mergers and acquisitions (private or public) or takeover transactions (as, for instance, in the manner set forth in the City Code on Takeovers and Mergers).

Please note that the absence of "certain funds" provisions under Andorran laws is a direct consequence of the fact that, under the bona fide principle coverage, parties must negotiate and enter into agreements following a duty of good faith duty. Therefore, if a party negotiates and enters into an agreement without the creditworthiness to fulfil its obligations arising out of or in connection with it, its counterparty would be entitled to make a claim for damages on the grounds of extra-contractual liability.

Notwithstanding the foregoing, specific "certain funds" provisions may validly be contractually provided by parties to a specific transaction to demonstrate certainty of funding (for example, as a bidding criterion in order to enter into a sale and purchase agreement) and full and unconditional funding disposal at the time of completion of the transaction. Specific penalties of different types ("*clàusula penal*") may also be established between the parties.

4. Tax

4.1 Withholding Tax
If the lender is a natural person, the amounts paid to the lender by a legal person who is a tax resident in Andorra are subject to withholding tax, at a rate of 10%.

4.2 Other Taxes, Duties, Charges or Tax Considerations
The payments collected as interest by a legal entity will be included in the tax base for the calculation of the Corporate Income Tax ("*Impost de Societats*").

4.3 Usury Laws
There are no specific laws or regulations limiting the amount of interest that can be charged. However, the Andorran Superior Court ("*Tribunal Superior de Justícia d'Andorra*") has recognised usury in several resolutions based on the interest regulated

by the Andorran Banking Association ("*Associació de Bancs Andorrans*").

5. Guarantees and Security

5.1 Assets and Forms of Security

The assets typically available as collateral to foreign lenders are as follows:

- first or second-ranking mortgage(s) over a borrower's real estate assets;
- pledge(s) over the shares of the borrower's subsidiaries;
- pledge(s) on the borrower's bank accounts (over both the bank account balance and the banking account), normally along with periodical cash-sweeps and ad hoc limitations – eg, cap-alike limitations (maximum-free disposal amounts) or floor-alike limitations (minimum-unavailable amounts and disposals);
- pledge(s) granted over credit rights deriving from any income-producing agreements entered into by the borrower (eg, insurance policies, O&M agreements or hedging agreements that generate periodic, liquid, due and payable credit rights to the borrower); and
- in certain cases, pledge(s) over specific assets of the borrower (eg, highly specialised or heavy machinery).

Creation of Security Interests

Under Andorran laws, the creation of security interests does not require notarisation (unless effect against third parties is sought), except in the case of mortgages, where constitution before a public notary followed by registration acts as a validity condition. However, as a matter of best practice, notarisation is advisable, in order to increase effectiveness against third parties. On the other hand, decisions authorising the creation of a valid security over specific asset(s) must be adopted in accordance with the generic legal and statutory requirements applicable to the pledger/company; specifically, in a pledge over company shares, the registration of such security interest in the Registry Book of Shareholders ("*Llibre Registre de Socis*") is required.

It is worth noting that securities in Andorra – as opposed to other neighbouring jurisdictions – only grant creditors a preferential position to receive their credit from a specific debtor's asset in respect of other ordinary creditors in an insolvency scenario.

Upon notarisation of the mortgage or security interest, registration usually takes one or two weeks.

Costs

In terms of the costs involved, the notary public applies the corresponding fee depending on the value of the secured liability. Those fees were published by means of the Decrees of 3 and 10 May 2000, and the specific amount varies in accordance with the specific nature and economic interest of the transaction.

5.2 Floating Charges or Other Universal or Similar Security Interests

Due to the rigid principle of specialisation and determination imposed by Andorran laws, creating guarantees for a multiplicity of obligations through a floating charge – as configured by Common law – is not permitted.

Nevertheless, Andorran laws tolerate the creation of a pledge ("*penyora*") over future credit rights of the borrower. Moreover, the legal regime established by Act 8/2013, May 9th, which covers the organisational requirements and operating conditions of operating entities in the Andorran financial system, investor protection, market abuse and financial securities agreements ("*Llei 8/2013, del 9 de maig, sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercat i els acords de garantia financera*"), enables the creation of security financial collateral arrangements that guarantee relevant financial obligations consisting of or including – totally or partially – present or future, actual or contingent or prospective obligations, as well as obligations of a specified class or kind arising from time to time.

Alternative options for replicating the effects of a floating charge under Andorran laws – especially in syndicated lending scenarios – are the creation of different pledges over the pledged asset to the benefit of different lenders, assigning a percentage to each guaranteed obligation with joint execution agreed upon an intercreditor agreement (with the same or different ranks), or the creation of concurrent pledges (ranking pari passu), with regulation of the distribution of the amount obtained upon enforcement between creditors.

5.3 Downstream, Upstream and Cross-Stream Guarantees

Andorran law tolerates the creation of downstream, upstream and cross-stream guarantees. While no express legal restrictions apply to downstream guarantees, the provision of upstream guarantees may incur the risk of appreciating fraudulent conveyance ("*acció pauliana*") in an insolvency scenario, in which, for instance, the lender grants financing to a parent company that merely holds the shares of a subsidiary company as an asset.

In this connection, if successfully proved before an Andorran court, the lender would be exposed to the exercise of the claw-back regime foreseen by Decree dated 4 October 1969 ("*Decret en relació a la cessació de pagaments i fallides, del 4 d'octubre de 1969*") in the scenario of the originator's insolvency declaration ("*cessació de pagaments*"), which would determine that

the provision of the upstream guarantee is set aside, unless the existence of some consideration in favour of the guarantor/subsidiary can be proved (ie, as the subsidiary guaranteeing debt holds no shares in the parent company borrowing the funds, the subsidiary/guarantor does not directly receive any benefits from the financing and, thus, the risk of the provision of the upstream guarantee generates obligations upon the subsidiary/guarantor that largely exceed those of the mother company borrowing financing, or even qualifies as a gratuitous act).

See **7.5 Risk Areas for Lenders**.

5.4 Restrictions on Target

In a target-acquisition scenario, the target – incorporated as a public limited company ("*societat anònima*") or as a private limited company ("*societat limitada*") – is restricted from granting financial assistance for the acquisition of its own shares in accordance with financial assistance rules provided for by capital companies' regulations. Unlike the legal regime of adjacent jurisdictions, financial assistance rules foreseen by Act 20/2007, October 18th, on Public Limited Companies and Private Limited Companies ("*Text refós de la Llei 20/2007, del 18 d'octubre, de societats anònimes i de responsabilitat limitada*") limit the granting of assistance over the target's shares to a maximum generic percentage of 10%. In this respect, it is mandatory to make an accounting reserve on the liabilities' balance sheet of the target that is equivalent to the value of the shares accepted as guarantee.

These restrictions do not affect Andorran financial entities entering into crediting transactions with third parties.

5.5 Other Restrictions

There are no other particular restrictions, nor significant costs associated with the granting of securities or guarantees under Andorran laws, but it is worth noting that the creation of guarantees over public domain assets ("*béns públics*"/"*béns patrimonials*") is legally restricted.

When security is taken over financial instruments, recourse to financial collateral security arrangements is advisable, so this sort of guarantee is expressly regulated in Act 8/2013 of 9 May 2013 on the organisational requirements and operating conditions of entities operating in the Andorra financial system, investor protection, market abuse and financial securities agreements ("*Llei 8/2013, del 9 de maig sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercat i els accords de garantia financera*") – in conjunction with Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, whose implementation into the Andorran legal framework was completed in March 2019 – and gives heightened protection for lenders.

The foreign investment authorisation restrictions outlined in **3.2 Restrictions on Foreign Lenders Granting Security** must also be taken into account.

5.6 Release of Typical Forms of Security

Overall, the typical forms of security are released upon the payment or cancellation of their secured obligations, yet parties to the specific financing/loan agreements and security packages normally agree to carry out further formalities on this release procedure on a case-by-case basis.

In a release of possessory pledges, the return of possession of the pledged asset to the borrower/pledger is required. For non-possessory pledges ("*penyora sense desplaçament*") and pledges over banking accounts or financial instruments, specific formalities may replace the return of possession over the asset to the borrower/pledger.

5.7 Rules Governing the Priority of Competing Security Interests

Due to the absence of a Land Registry in Andorra, priority in mortgages is ranked by means of recording the granting of a public mortgage deed in the Andorran Notary Chamber ("*Cambra de Notaris del Principat d'Andorra*") – ie, the date of constitution of the mortgage.

In terms of possessory and non-possessory pledges, priority is determined by their perfection and the transfer of possession.

Contractual subordination is commonly used in Andorra (eg, the subordination of junior debt by agreement between the senior creditor and junior creditor). The subordination of a secured mortgage to a newly created one requires an express agreement between creditors and the raising of such consent into the status of a public deed before a public notary. In the subordination of a pledge, express agreement between the parties is required, and its documentation through a notarial deed is recommended.

Due to the absence of an express provision in the insolvency legislation, contractual subordination should prevail as long as the pars condition creditorum principle is respected, as estimated by the insolvency judge ("*batlle*").

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

A secured lender will be able to enforce the collateral granted by a borrower as guarantee in accordance with the contractual

provisions established by the specific loan and security contractual package entered into between them.

For financing transactions, a typical security package structure would cover the following types of guarantee:

- mortgage(s) (if the target is a real estate asset);
- pledge(s) over the shares of a special purpose vehicle, if applicable; normally the SPV will be incorporated using the form of a private limited company set up under Andorra laws;
- pledge(s) over any SPV's bank accounts held with local banking entities on the company's bank accounts (usually with periodical cash-sweeps); and
- more commonly in project financing transactions, pledges over credit rights arising from all sorts of cash-flow-generating asset(s) and agreement(s) would be granted (eg, insurance and hedging agreements).

The creditor shall notify the counterpart of each pledged agreement in an enforcement scenario in order to receive any payments due or positive balanced set-off rights deriving from the pledged credit rights.

Creation of Mortgages

The creation of mortgages requires the intervention of a notary public and the granting of a public deed (ie, mortgage loan) followed by subsequent registration (by means of a margin note made by the public notary) before the Chamber of Notaries of the Principality of Andorra ("*Cambra de Notaris del Principat d'Andorra*") as a condition of validity for the mortgage. This body acts as a centralised land register for public deeds granted by Andorra public notaries. The creation of pledges does not require the intervention of a public notary, unless such pledge must have legal effects against third parties

Enforcement of Loans and Guarantees

In connection with the enforcement of loans and guarantees, it is worth noting that, under the current state of the law, there is no direct foreclosure enforcement procedure under Andorran procedural rules, so it is necessary to carry out a declarative civil proceeding as a prior step for the enforcement of a claim. A notarial enforcement proceeding is also available upon the parties' commitment.

6.2 Foreign Law and Jurisdiction

The choice of a foreign law as the governing law of a loan or security agreement, the submission to a foreign jurisdiction and a waiver of immunity will be valid and binding under the laws of Andorra and, consequently, will be upheld in connection with a claim presented by a foreign lender before Andorran courts.

The choice of a foreign law will be upheld by Andorran courts if the content and validity of the relevant provisions of the chosen laws may be duly proved without contravention of the Andorran Constitution or Andorran principles of public order.

If a specific submission clause is agreed by the parties to a loan or security agreement, it must comply with the following requirements in order to be sustained before the Andorran courts:

- it must govern an international situation;
- it must refer to a state legal framework; and
- there must be an express election of a specific law that is expressly and universally agreed by the parties to the relevant agreement.

Upon verification of these requirements, Andorran courts should decline their competence in favour of the courts of the elected jurisdiction.

6.3 A Judgment Given by a Foreign Court

The enforcement of a judgment given by a foreign court against an entity located in Andorra is subject to confirmation by the High Court of Justice of Andorra ("*Tribunal Superior de Justícia d'Andorra*") through a previous exequatur procedure.

Proceedings for exequatur are brought by the party that is interested in the enforcement of the foreign judgment (ie, the foreign lender). This procedure is subject to claim and counterclaim, and the Public Prosecutor ("*Ministeri Fiscal*") and the party against whom the enforcement is sought take part in it. The approval of the exequatur entails verification by the Civil Chamber of the High Court of Justice ("*Sala Civil del Tribunal Superior de Justícia*") of the following requirements pursuant to the foreign judgment:

- the competence of the court that has given the ruling;
- the regular nature of the foreign procedure, including the right to jurisdiction (under the Andorran Constitution);
- the application of the competent law in compliance with Andorran conflict rules;
- conformity with national and international public order; and
- the absence of any fraud from an Andorran legal standpoint.

Pursuant to the enforcement of an arbitral award ("*laude*") against an entity located within Andorra, the starting point is the condition of Andorra as a State Party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958, which entered into force in Andorra in September 2015. Therefore, arbitral awards are rec-

ognised as directly enforceable instruments before Andorran courts without a retrial of the merits of the case.

6.4 A Foreign Lender's Ability to Enforce Its Rights

The key issue affecting a foreign lender's ability to enforce its rights under a loan or security agreement is the absence of a direct foreclosure procedure under Andorran procedural rules (see **6.1 Enforcement of Collateral by Secured Lenders**).

Furthermore, please note that the appropriation of secured assets by a foreign lender upon carrying out enforcement procedures may trigger foreign investment authorisation requirements (see **3.2 Restrictions on Foreign Lenders Granting Security**).

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

Due to the small size of the Andorran industrial and commercial sector, viable pathways for company rescue or reorganisation procedures out of insolvency proceedings are limited. Specifically, the practice of company aid in Andorra is focused on entering into refinancing agreements with local banking entities or receiving financial support from a parent or subsidiary within group structures.

7.2 Impact of Insolvency Processes

Under the Insolvency Decree dated 4 October 1969 ("*Decret en relació a la cessació de pagaments i fallides, del 4 d'octubre de 1969*"), the commencement of insolvency proceedings does not generally have an impact on a lender's rights to enforce its loan or any security or guarantee, as long as its claims are guaranteed by means of a security – ie, mortgage, pledge (either ordinary as possessory or non-possessory nature of financial collateral arrangement), bonds or special privileges as provided for in insolvency rules – and up to the value of such specific guarantee or security (ie, any amount of the claim exceeding the value of the guarantee will bear the nature of an ordinary claim).

There are specific timeframes for enacting the enforcement of a mortgage securing claims (two months from the date of the cessation of payments) by the creditor. For claims secured by way of pledges, the enforcement is not subject to any specific term and may be immediately exercised by the creditor.

Pursuant to the specific restructuring and resolution regime regulated by Act 8/2015 on urgent measures to introduce mechanisms for the restructuring and resolution of banking entities ("*Llei 8/2015 de mesures urgents per implanter mecanismes de reestructuració i resolució d'entitats bancàries*"), which largely mirrors Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, the Andorran State Resolution Agency for Banking Entities ("*Agència Estatal de Resolució d'Entitats Bancàries*" – *"AREB*") is granted powers to stay certain contractual rights through the issuance of an administrative act (namely, any payment or delivery obligation arising from any agreement entered into by the affected banking entity) for a maximum period extended from the date on which the exercise of such stay right is published until midnight on the following business day.

7.3 The Order Creditors Are Paid on Insolvency

Neither the Insolvency Decree nor the general civil rules expressly determine the preference and ranking of credits. According to the insolvency rules and Andorran case law, a distinction may be made between special privileges ("*privilegis especials*") and general privileges ("*privilegis generals*") over movable assets ("*béns mobles*") and real estate assets ("*béns immobles*"). In this light, creditors would be paid in the following order:

- creditors granted a special privilege over movable assets (pledges along with bonds and certain specific privileges, such as those afforded to the sellers of movable assets);
- creditors granted a special privilege over real estate assets (mortgages and concrete privileges, such as those in favour of architects, real estate asset sellers and real estate asset acquirers to recover the price paid plus legal interests in the resolution of the sale agreement);
- creditors granted a general privilege (such as the privilege provided to workers for their salary amounts); and
- the rest of the creditors, pro rata of their respective credits upon verification and admission by the insolvency administration.

Please note that, in the case of special privileges (ie, claims secured by means of mortgages, pledges, bonds or any other special privilege over movable or real estate assets), creditors are favoured with a segregated enforcement right, which allows the enforcement of the specific guarantee on the creditor's own benefit regardless of the development of the insolvency proceeding(s).

7.4 Concept of Equitable Subordination

There is no concept of equitable subordination under the Insolvency Decree.

7.5 Risk Areas for Lenders

The main risk areas for lenders upon the insolvency of the borrower, the security provider or the guarantor relate mainly to the enforcement of the financing contractual set and the guaran-

tees provided by the security provider and the guarantor. Claw-back risk must also be monitored. Under the claw-back regime stated in the Insolvency Decree, the Andorran competent judge ("*batlle*") is entitled to set aside any transactions of any nature that are carried out by the borrower within the 24 months prior to the initiation of its insolvency procedure and are considered to be prejudicial to the borrower's insolvency estate, and that:

- fall into any of the following categories:
  (a) transactions carried out through agreements where the borrower's obligations largely exceed those of its counterparty;
  (b) if the total prepayments of non-matured debts are verified; or
  (c) all mortgages or guarantees granted over assets of the borrower after the cessation of payments date for securing pre-existing debts of the insolvent entity; or
- are gratuitous acts done a maximum of six months prior to the date of cessation of payments as declared by the Andorran judge.

Additionally, it is crucial to set forth the election of the nature of the foreclosure/enforcement procedures and the setting up of a comprehensive security package.

8. Project Finance

8.1 Introduction to Project Finance

Project financing has been a rising trend in the Andorran financial market in recent years. Moreover, this trend is likely to continue, fostered by synergy between the public and private sector.

Public Sector Initiatives

In public sector initiatives, the main stream of projects is due to Andorra's commitment to shift its economy towards a sustainable energy model based on the predominance of renewable energies, which enables a reduction in foreign energy dependence (a characteristic trait of the Andorran balance of payments) upon investment in renewable energy-generating instruments, projects and premises. The development of road and other transport infrastructure (for instance, a heliport and – potentially – an airport) is also expected, and will be accompanied by privately led projects for the development of tourism premises and real estate promotion transactions.

Major Milestones

The main milestones in project finance have included road infrastructure projects such as *Túnel dels Dos Valires* (EUR159 million) and *Túnel de la Tapia* (EUR42 million), and energy premises – the first liquefied natural gas-powered cogeneration plant is in Soldeu, with further premises to be constructed during the coming years). This lift off of the Andorran project finance market must be considered in connection with Act 21/2018, September 13, on the impulse to energy transition and climatic change ("*Llei 21/2018, del 13 de setembre, d'impuls de la transició energètica i del canvi climàtic*"), which reasonably prepares the ground for further renewable energy projects (including the creation of an Andorran CO2 emissions market) to achieve the climatic goals outlined in the Kyoto Protocol and the Paris Agreement of 30 November 2016. Moreover, a White Energy Book ("*Llibre Blanc de l'Energia d'Andorra*") has also been issued, following this trend.

Legal Framework

The legal framework of project financing is composed of different regulations, whose basis is grounded in the financial regime regulating the following:

- the provision of financial activities in Andorra (mainly Act 7/2013, May 9th, on the regime for the operational entities of the Andorran financial system and other provisions that govern financial activities in the Principality of Andorra, and Act 8/2013, May 9th, which covers the organisational requirements and operating conditions of operating entities in the Andorran financial system, investor protection, market abuse and financial securities agreements);
- the foreign investment regime (Act 10/2012, June 21st, on Foreign Investment);
- bankruptcy proceedings (Decree dated 4 October 1969);
- capital companies (Act 20/2007, October 18th, on Public Limited Companies and Private Limited Companies);
- the legal regime on guarantees (governing their creation, life cycle and enforcement, deriving from Andorran civil rules); and
- procedural rules (civil procedural rules, notarial legislation and arbitration regulations – Act 13/2018, May 31, on the creation of the Andorran Arbitration Court and Act 47/2014, December 18th, on Arbitration).

8.2 Overview of Public-Private Partnership Transactions

Public-private partnership transactions are in their infancy, with none materialising so far; however, it is reasonable to expect a stable stream of collaboration between the public and private sectors in the coming years, especially for renewable energies projects.

The key piece of legislation is the Public Contracts Act dated 9 November 2000 ("*Llei de contractació pública*"), whose main trait is the imposition of the following specific requirements on foreign contractors ("*contractistes estrangers*"):

- verification of their legal capacity and good standing before their home country courts;
- express submission to the Andorran courts related to bidding for and execution of the contract;
- bearing translation costs in front of a public administration;
- issuing tenders, preferably in Euros;
- for construction contracts, an authorisation for temporary establishment must be requested and maintained during the whole execution of the contract; and
- for public service management contracts, an Andorran shares company must be incorporated and operate for the concession period.

8.3 Government Approvals, Taxes, Fees or Other Charges

Broadly speaking, it is not necessary to pay taxes, fees or other charges for the execution of project financing transactions in Andorra. In this vein, public authorities' ability to grant approvals is determined on a case-by-case basis, although the main body for granting authorisations for project financing transactions is recognised to be the different town halls ("*Comuns*") of each of the seven administrative units ("*Parròquies*") that integrate the Andorran territorial administration, in accordance with the Andorran Constitution and the administrative regulations on the distribution of competences of the Comuns and the Andorran Government ("*Govern d'Andorra*").

Comuns have jurisdiction over the governance and management of public domain assets ("*béns públics*") and private domain assets ("*béns privats*") located within their territories, which extends to the management of natural resources.

Specifically, one of the main authorisations that may be triggered when carrying out a project finance in Andorra is the Environmental Impact Assessment ("*Avaluació d'Impacte Ambiental*"), regulated by the Regulation for carrying out works or activities that modify land's current state ("*Reglament per a la realització de treballs o activitats que modifiquin l'estat actual del terreny, del 25 de juliol del 2001*"). This authorisation must be obtained for developing projects that, in general terms, may have substantial effects on the environment (eg, mining, the construction and expansion of roads, tunnel excavation, airport facilities and electricity transport facilities exceeding 20 kW), and is issued by the Andorran Government after analysis by the competent ministry via a regulated administrative procedure. This authorisation is a condition precedent for the execution of the specific project(s).

8.4 The Responsible Government Body

In the oil, gas, power and mining sectors, the primary laws and main regulations are as follows:

- the Act on ordination of combustible gases dated 22 June 2000 ("*Llei d'ordenació del sector dels gasos combustibles, de 22-6-2000*") and the Decree on the approval of the Regulation of storage, supply, distribution and use of combustible gases ("*Reglament d'emmagatzematge, subministrament, distribució i ús de gasos combustibles*") (oil and gas sector), enacted on 28 February 2019; and
- Act 5/2013, May 9th, on the modification of Act 85/2010, on provisional measures related to electrical energy ("*Llei 5/2013, del 9 de maig, de modificació de la Llei 85/2010, del 18 de novembre, de mesures provisionals en relació amb el règim d'energia elèctrica*"), Decree of 28 February 2001 on the approval of Regulation stating technical conditions for electricity distribution premises ("*Decret de 28-2-2001 pel qual s'aprova el Reglament relatiu a les condicions tècniques que han de satisfer les instal·lacions de distribució de l'energia elèctrica*") and Regulation of low tension electric installations ("*Reglament d'instal·lacions elèctriques de baixa tensió, del 2-11-1988*") (power sector).

Activity in the mining sector is limited at present, although the mining of iron ores previously played an important role in the Andorran industrial sector for almost 20 years.

8.5 The Main Issues When Structuring Deals

The key issues for setting up and executing project financing transactions in Andorra include the following:

- structuring the deal firmly, covering risk aspects arising from the cross-border nature of the transaction – eg, the creation of a comprehensive security package, prior analysis of the legal and regulatory regime (especially on foreign investment authorisation), establishing contacts with the relevant administration and analysing and adequately assessing the borrower (legal opinions, representation powers, etc), and stating the financing instrument used (eg, loan or credit);
- determining the legal form of the project company used as an SPV (normally incorporated as a private limited company – "*societat limitada*") and the capital stake that will be held by the foreign entity; and
- having a clear picture of the applicable regulations to the project, particularly regarding the enforcement instruments and procedures.

8.6 Typical Financing Sources and Structures for Project Financings

Typical sources for funding project financings include recourse to club deals (composed of local and foreign lenders) and the incorporation of an Andorran SPV. Banking financing is predominant in this sort of transaction, while recourse to export credit agency financings or project bonds is not frequently seen,

mainly due to the absence of any capital markets legislation in Andorra.

However, due to the legislative framework and political climate (see **8.1 Introduction to Project Finance**), the issuance of project or green bonds to fund project finance transactions is emerging as an interesting perspective, particularly when other bond issuances have taken place recently (please see **1.5 Banking and Finance Techniques**).

8.7 The Acquisition and Export of Natural Resources

Overall, the main issues associated with the acquisition and export of natural resources in Andorra relate to the regulatory and administrative authorisations. Please note that Andorra payment balances present an energy deficit, mainly due to the lack of fossil resources and electricity, which are imported mainly from France and Spain.

In light of this, the export and import of electrical energy is exclusively reserved to the public company FEDA ("*Forces Elèctriques d'Andorra*") as a direct management regime, as is the distribution of electrical energy (wholesale and retail distribution) in accordance with Act 5-2016, March 10th, regulating FEDA and the electric sector regime ("*Llei 5-2016, del 10 de març, que regula l'ens públic Forces Elèctriques d'Andorra (FEDA) i el règim de les activitats dels sectors elèctric, del fred i de la calor*").

However, co-generation activities have been regulated and are subject to a liberalised legal regime, which permits the indirect management thereof (administrative concession regime).

8.8 Environmental, Health and Safety Laws

The main health, environmental and safety laws applicable to projects are the General Act on territorial planning and urbanism dated 29 December 2000 ("*Llei general d'ordenació del territori i urbanisme, de 29-12-2000*"), the Construction Regulation dated 3 October 2010 ("*Reglament de Construcció, del 3-10-2012*"), the Act on security and industrial quality dated 22 June 2000 ("*Llei de seguretat i qualitat industrial, de 22-6-2000*") and the Energetic Regulation on edification ("*Decret de l'1 d'octubre del 2010, d'aprovació del Reglament energètic en l'edificació*").

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