Colombia

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Creating collateral security packages

1 What types of collateral and security interests are available?

Law 1676 of 2013 (Law 1676) regulates the guarantees (security) over moveable assets (moveable guarantees). This law allows security to be granted over any type of goods, agreements, or rights, subject to an economic valuation by the parties, including future assets.

Moveable guarantees can be granted either with or without physical possession of the assets by the creditor. Pledges without possession may be granted over goods deemed to be necessary for the commercial exploitation of a going concern, or that are destined to or a product of such commercial exploitation. Pledges without possession can also be established over going concerns (the commercial establishment) and will be understood to include commercial names, trademarks, patents, inventory, credits, moveable assets and installations, lease agreements and all other rights and obligations that derive from the relevant commercial activity. Law 1676 includes the possibility of granting a pledge over all present and future assets and economic rights of the borrower or guarantor without the need to pledge the commercial establishment.

Mortgages can be granted over real estate property.

Guarantee trust agreements, which involve the conveyance of ownership of the goods over which the security is granted to a trust, are also a means of establishing a security interest over moveable and immoveable assets as well as over contractual rights. Guarantee trusts can also be used to establish a security interest over receivables or onshore and offshore bank accounts.

Another type of security used in projects is the conditional assignment of contracts by the borrower to the creditor so that the creditor may undertake the operation of a project upon the occurrence of an event of default. In this case, prior acknowledgement and consent is executed by the conditionally assigned party accepting that upon notice given by the creditor it accepts the assignment of the contract and will continue to perform it.

Law 1676 permits the execution of accounts control agreements, which were previously not regulated under Colombian law. This is an agreement between the bank, the guarantor and the guaranteed party whereby the bank accepts to follow the instructions of the guaranteed party with respect to the funds deposited in the bank accounts.

Licence or concession rights cannot be used as collateral as they are intuitu personae and not subject to assignment without the prior authorisation of the relevant governmental agency.

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

The security interest granted by means of a moveable guarantee with possession agreement is perfected at the time physical possession of the pledged assets is transferred to the creditor, or a third party designated by the parties. No fees, taxes or other charges would be applicable, except for any fees charged by the third party holding possession of the goods if the parties wish to make use of that option. The pledge with possession agreement may be oral.

In the case of moveable guarantees without possession agreements, the security interest is perfected with the written agreement between the pledgor and pledgee, bearing the notarised signatures of the parties, but it is enforceable against third parties only with its registration in the new national registry of liens over moveable assets (National Registry) maintained by the Confederation of Chambers of Commerce. A small fee is payable for the notarisation of the signatures. Registration of the agreement with the National Registry is subject to a nominal registration fee. Priority is given to the first registered pledge. No stamp tax is due with regard to the execution of a pledge without possession agreement. Moveable guarantees over shares must also be registered in the corresponding stock ledger.

Mortgages over real property need to be executed by means of a public deed. In order for the security interest to be perfected, the public deed shall be registered with the land registry office of the city or town where the property is located. The amount of the registration tax depends on whether the mortgage secures existing or future obligations.

As a general rule guarantee trust agreements over moveable assets are perfected with the written agreement between the trustee and settlor, but they need to be registered with the National Registry for the security to be enforceable against third parties, giving rise to a small registration fee that is payable upon filing for registration. Certain exceptions for particular types of companies that are exempted from the general insolvency regime apply (such as domiciliary utility companies, among others), in which case registration is not required.

Trust agreements over immoveable assets that involve the conveyance of property to a trust company shall be effected by means of a public deed, and notary fees apply. Perfection of the security occurs when the agreement is registered with the land registry office of the town or city where the property is located and the registration fee has been paid, which is calculated over a percentage of the higher amount between the amount of the agreement and the valuation of the property. Registration tax is due at the time of filing and is calculated as a percentage of the amount of the trust commission.

Accounts control agreements are perfected with a written agreement between the bank, the guarantor and the guaranteed party, and priority over the security is guaranteed by means of the control of the bank account.

A corporate entity, in the capacity of an agent or trustee may hold collateral on behalf of the project lenders as a secured party.

The assets included in a trust are separate from the trustee's assets and will be excluded in the event of the trustee's bankruptcy.

Assets included in a trust that has been registered in the National Registry as a guarantee trust will be bankruptcy remote.

In order to enforce security interests the foreign creditor (or the security agent) must have a foreign lender code granted by the Colombian Central Bank to be able to conduct enforcement activities through the commercial exchange market.

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

The existence of any type of security or pledges without possession and guarantee trust agreements can be verified by reviewing the records of the National Registry, which are publicly available. If there are no liens registered it does not necessarily mean that no lien exists, but such a lien will not have priority over the creditor's lien once registered. Likewise, the existence of any pledge over shares can be verified by reviewing the company's

shareholders' ledger and it may be verified also by reviewing the records of the National Registry.

The existence of mortgages can be verified by requesting in the relevant registry office a certificate as to ownership of the relevant property that will reveal any prior mortgages.

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Foreclosure is very simple in the case of guarantee trust agreements. The agreement should contain specific instructions to the trustee as to how to proceed with the assets or rights if an event of default occurs (eg, sell the assets and pay the secured party with the proceeds, or transfer the assets or rights to the secured party).

Private foreclosure is allowed under Law 1676. It is now possible to agree that the lender will receive the collateral as payment of the guaranteed obligations in the event there is a default under the guarantee agreement. Foreclosure before the Colombian courts will no longer be required if this alternative is established in the agreement. Also, a special foreclosure proceeding before public notaries and chambers of commerce is provided by Law 1676. Although Law 1676 provides for a procedure for the enforcement before these entities, the procedure can be modified by the parties in the guarantee agreement. If none of the alternatives mentioned before is agreed between the parties, the judicial foreclosure is available.

In the case of mortgages, there are strict rules under Colombian law that forbid any action that leads to a secured creditor gaining direct access to mortgaged assets. A proceeding before a Colombian court needs to be initiated, as a result of which the mortgaged assets are to be sold in auction, and the secured party paid with the proceeds thereof. The project lenders may participate as buyers in any sale. Judicial sales are made in Colombian pesos.

In order for secured lenders to enforce their rights over the collateral it is necessary that they issue the pertinent instructions to the trustee as to how to proceed with the collateral or enforce the mortgages before the relevant courts.

5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

In the event of an insolvency proceeding in respect of the project company the rights of the project lenders under any pledges or mortgages will be stayed. In a reorganisation proceeding the duly registered collateral that it is not a fundamental asset for the business may be foreclosed by the lender. In a liquidation proceeding, duly registered collaterals are excluded from such a proceeding.

In the event that an insolvency proceeding is initiated in respect of the settlor of a guarantee trust and the trust agreement was duly registered with the National Registry, the assets transferred to the trust will not be taken into account for the reorganisation proceeding. However, the lenders will not be able to enforce the guarantee during the insolvency proceeding, unless the assets in the trust are not fundamental assets for the business.

In the event of a bankruptcy proceeding labour and tax debts will be paid preferentially over other credits.

The general bankruptcy regime is set forth in Law 1116, 2006. However, there are several types of companies that are expressly excluded from said regime, including all companies that provide public utility services, which includes all companies involved in activities related to water and sewerage, power generation, transport and distribution of electric energy and others, as well as financial entities, government entities, stock exchanges and agricultural exchanges, which are subject to special regimes.

Companies providing public utility services are subject to Law 142, 1994, which does not provide for a restructuring or reorganisation procedure such as the one provided under Law 1116, 2006. Law 142 provides that the insolvency regime provided under the Financial System Statute for financial entities is also applicable to companies that provide public utility services. The Superintendency of Public Utilities may take possession of the management of the business or carry out the administrative liquidation thereof. Taking of possession can only take place if the insolvency of the company can be deemed to affect the delivery of the public utility service provided by the insolvent company. Taking of possession can lead to the control of the management of the company being restored to its owners or the liquidation of the company.

The claims of foreign creditors and local creditors have equal treatment.

There is no other process than court proceedings to seize the assets of the project company in an enforcement.

Foreign exchange and withholding tax issues

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

The Colombian foreign exchange market is divided by law into the 'commercial exchange market' and the 'free market'. The commercial exchange market is the main market since most trade and financial transactions have to be mandatorily traded in said market through authorised exchange market intermediaries (which include local commercial banks, local mortgage banks, local financial corporations and local exchange bureaus, among others). Payments between Colombian residents and foreign residents that are mandatorily required to be channelled through the commercial exchange market include import and export transactions, equity investments made by Colombian residents abroad, foreign indebtedness transactions and foreign investments in Colombia. The exchange rates at which commercial exchange market transactions are made can be freely negotiated between the parties involved. Colombian residents are entitled to hold accounts in foreign currency with financial institutions abroad, but not in Colombia. As a general principle, payments between Colombian residents may not be made in foreign currency. Foreign investments in Colombian companies or assets need to be duly registered with the Colombian Central Bank as well as investments by Colombian residents abroad. Foreign loans to Colombian residents must be duly informed to the Colombian Central Bank. Non-compliance with any of these requirements can give rise to the imposition of fines.

7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

In order for a Colombian project company to legally convert Colombian pesos into foreign currency to make payments under a foreign loan, the lender shall be included in the list of lenders recognised by the Colombian Central Bank. In addition, a foreign exchange declaration form needs to be filed every time a disbursement is made under the loan.

The Colombian Central Bank is vested with the authority to establish, when it deems it advisable to control the volatility of the value of the Colombian peso, a mandatory deposit equal to a percentage of each disbursement made under a foreign loan. At present, this deposit is set at zero per cent.

Remittances of investment returns have no restrictions from a foreign exchange point of view so far as they have been duly registered with the Colombian Central Bank. Registration of such investments grants the investors a guarantee that they will have access to foreign currency through the controlled foreign exchange market. No taxes are applicable to the remittance of dividends so long as the company generating the same has paid its relevant taxes.

Loan payments to other jurisdictions also have no foreign exchange restrictions so far as the relevant loan has been duly informed to the Colombian Central Bank – payment of interest to foreign lenders is considered local source income and subject to a 14 per cent withholding by the borrower making the payment if the loan agreement is for a term exceeding one year, otherwise a 33 per cent withholding tax rate would apply.

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Export-generated earnings are required to be repatriated within three months of accruing. When repatriated, earnings are required to be converted into local currency through the commercial foreign exchange market. Colombian investments abroad are to be duly registered.

There is a special foreign exchange regime for companies that explore and exploit oil, natural gas, coal, ferronickel and uranium. These

companies are not required to repatriate foreign earnings and they can maintain foreign currency accounts abroad.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies may maintain foreign currency accounts with foreign financial institutions abroad. Foreign currency accounts may belong either to the free market or to the commercial exchange market. A foreign exchange account can be registered as a compensation account, in which case it can be used to pay for obligations that must be mandatorily channelled via the commercial exchange market, in which certain reporting obligations apply.

Under Colombian foreign exchange regulations, no foreign currency accounts may be held in Colombia.

Foreign investment issues

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Foreign investment in Colombia is generally permitted in most sectors of the economy and there are no restrictions, fees or taxes that affect such investments. Taxes are the same as for any investment made by a local investor. At present, foreign investment is not allowed in defence or national security activities or in activities related to the processing, disposal and discarding of toxic, dangerous or radio-active waste not produced in Colombia. The restrictions also apply to foreign investors or creditors in the event of foreclosure of the project and related companies.

Foreign investment shall be registered with the Colombian Central Bank. Registration is automatic with the filing of the foreign exchange declaration at the time of conversion of foreign currency into Colombian pesos, and is required to ensure that the project company has access to the foreign exchange channel to receive payments and to avoid onerous fines.

Colombia has entered into bilateral investment treaties with several countries: China, India, Japan, Peru, Spain, Switzerland and the United Kingdom. The agreements entered into with Peru, Spain and Switzerland are currently enforceable. The agreements executed with China, India, Japan and the United Kingdom are not yet enforceable. Registration requirements and foreign exchange regulations still apply.

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

The Colombian Financial Statute, as amended by Law 1328, 2009, provides that insurance agreements cannot be entered into in Colombia with foreign insurance companies not authorised to operate in Colombia or with their representatives or agents, except for insurance agreements related to social security, mandatory insurances, insurances that cover transported goods, the vehicle in which they are transported and civil liability, in relation to international sea transport, international commercial aviation and space launches and transport (including satellites) and insurances with which the policyholder, insured or beneficiary must first demonstrate the acquisition of the respective insurance, has a compulsory insurance or who are up-to-date with their obligations to social security and insurances, which policyholder, insured or beneficiary is the state.

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Foreign workers, technicians and executives require a work visa (TP-4) to legally work and reside in Colombia. This type of visa can be obtained at a Colombian consulate abroad or at the Ministry of Foreign Affairs in Colombia (the visa may also be obtained via internet). The TP-4 can be issued for multiple entries for up to three years. Exceptionally, when the companies require urgent specialised technical assistance, foreign workers (depending on their nationality) may apply for a TP-13 visa or a PIP-7 permit, which can be granted for up to 180 calendar days (visa) in the same calendar year or 30 calendar days (permit).

Also, it should be noted that additional to the visa, when the profession of the foreign national is a regulated profession in Colombia, and he or she will perform a position that requires the use of the knowledge derived from his or her profession, the foreign national must obtain a temporary licence to perform his or her profession in Colombia, otherwise, the competent authority (ie, for engineers the competent authorities are the Consejo Profesional Nacional de Ingenieria or the Consejo Profesional Nacional de Ingenierias Eléctricas, Mecánica y Profesiones Afines) may impose fines on the foreign national and also on the company. Not all the authorities grant licences; therefore, in those cases the foreign national will have to revalidate their professional title before the Ministry of Education.

For local companies operating in the oil sector, besides the immigration provisions indicated above, a special regulation applies pursuant to which they must pay to the Colombian personnel not less than 70 per cent of the total value of the payroll of the qualified personnel or specialists or the direction and trust (including local and foreign personnel) and not less than 80 per cent of the value of the payroll of the non-qualified employees (including local and foreign personnel). A company could hire a number of foreign employees that exceeds the percentages mentioned above, as long as it has authorisation from the Ministry of Labour and only for the suitable preparation of the Colombian personnel, otherwise, the Ministry of Labour may impose discretionary fines on the company.

13 What restrictions exist on the importation of project equipment?

The import of certain goods is subject to an import licence granted by the Ministry of Trade, Industry and Tourism. Such goods include radioactive isotopes and radioactive materials, hydrocarbons and petrol as well as any assets that are subject by law to compliance with technical regulations, environmental emissions certificates or control pursuant to international treaties or protocols to secure the protection of the environment. Other imports are subject to the free import regime, within which some imports require registration and others do not.

Payments made with respect to import and export operations are to be mandatorily channelled through the commercial exchange market. In addition, if credit for the down payment of the price of the imported assets is obtained, the operation is deemed to be a foreign indebtedness operation and shall be registered with the Colombian Central Bank to avoid onerous fines.

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Article 58 of the Colombian constitution provides that private property is guaranteed. Exceptionally, based on reasons related to public utility or the public interest, the state may expropriate private property; however, prior indemnification of the owner is required.

As a general rule, expropriation must be ordered by a court; however, the law provides certain extraordinary conditions where a public authority may carry out expropriation by means of an administrative proceeding (administrative expropriation), namely: expropriation can be deemed to be urgent as per the definition of Law 388, 1997; and the administrative authority deems that there are sufficient specific reasons of public utility and public interest to justify the expropriation. In addition, the local town council shall have indicated generally which local authority is charged with determining the occurrence of the urgency requirement and such authority shall have effectively declared such urgency.

There are no particular forms of investment that are specially protected from nationalisation or expropriation. No nationalisation or expropriation of project companies and assets has taken place in Colombia in its recent history.

Fiscal treatment of foreign investment

15 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives provided preferentially to foreign investors or creditors in Colombia. Payment of interest to foreign lenders is considered local source income and subject to 14 per cent withholding tax by the

borrower making the payment if the loan is for a term exceeding one year, otherwise a 33 per cent withholding tax rate would apply.

Government authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Oil and gas

Ecopetrol is a state company that was in charge of managing the exploration and exploitation areas before 2003. This role was given to the National Hydrocarbons Agency, an entity created after Ecopetrol's spinoff, which manages the oil and gas resources of the nation and has been in charge of assigning exploration and exploitation areas since 2003. Currently, Ecopetrol is in charge of the oil and gas contracts that were executed by it before 2003.

The Ministry of Mines and Energy (MME) oversees the general policy of the oil sector. Oil and gas companies are required to file reports before the MME. Downstream activities require authorisation from the MME. Further, the production, sale and transportation of gas are a public service and are regulated by the Commission of Regulation of Energy and Gas (CREG). Companies that perform these activities are required to register and file reports before the CREG.

Mineral extraction

The National Mining Agency, Ingeominas, which is responsible for administering the mineral resources of the nation, is charged with granting concessions over the exploitation of mineral resources.

Chemical refining

The environmental authorities (see below).

Water treatment

Activities are regulated by the CRA (Regulatory Commission for Water and Sanitation). The Superintendency of Public Utilities has the authority to impose fines and other sanctions in the event of non-compliance with applicable laws and regulations.

Power generation and transmission

Activities are regulated by the Regulatory Commission for Energy and Gas (CREG). In addition the Superintendency of Public Utilities has the authority to oversee the activities of the participants in said activities and impose penalties.

Transport

General public policy regarding transport is the responsibility of the Ministry of Transport. In addition the Superintendency of Ports and Transport has the authority to oversee activities and impose penalties. Aerocivil is in charge of airports and air transport.

Ports

General public policy regarding transport is the responsibility of the Ministry of Transport. The National Agency of Infrastructure (ANI) (formerly the National Concessions Institute (INCO)) has the authority to grant port concessions and to extend current concessions granted by other authorities. The Superintendency of Ports and Transport has the authority to oversee activities and impose penalties.

Telecommunications

Telecommunications are regulated by the Regulatory Commission for Telecommunications (CRC). The Superintendency of Companies has the authority to undertake control and surveillance over these companies and to impose fines and other penalties in the event of non-compliance with applicable laws and regulations.

With respect to environmental matters in all of the above areas, the Ministry of the Environment and local environmental authorities having jurisdiction over the area in which the activity is carried out are charged with granting environmental permits and licences, and overseeing the compliance with applicable environmental regulations. Since the enactment of the new Constitution in 1991, government participation in these sectors has been largely privatised.

Regulation of natural resources

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Title to all resources found in the subsoil, including oil, gas and minerals is with the nation, irrespective of where the property of the land lies. All rivers and waters that run through their natural beds are also state property and for public use, except rivers that are born and die in one property, which belong to the proprietor of the river banks. Land can be owned by private individuals and companies or by the state and other public entities. Any natural resources growing from the land (eg, plants) and animals that live on the land belong to the owner of the land.

Private parties may acquire the right to exploit the non-renewable natural resources found in the subsoil by means of a legitimate title given by the appropriate authority, for example, it can be a mining concession agreement granted by the appropriate authority. The right to exploit natural resources is granted by environmental authorities such as the National Authority for Environmental Licences (ANLA), and the Regional Autonomous Corporations (CAR) through special permits and authorisations. As consideration for the right to exploit a natural resource granted by means of a concession, the concessionaire is required to pay royalties or rights of use.

There are no restrictions in the law concerning the acquisition by foreign parties of such rights, provided that they establish a branch, affiliate or subsidiary domiciled in the country.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The percentage that must be paid under royalties on the extraction of natural resources depends on the type of natural resource exploited. Relevant authorities have determined different percentages depending on the extracted material. However, as a general rule royalties are calculated based on a determined reference price for the extracted material.

Under Colombian legislation there is no distinction between the royalties that a domestic and a foreign party must pay.

In addition to the mentioned royalties, there is a profit-based income tax. Domestic parties are taxed on worldwide income. Foreign parties are taxed on Colombian-source income only. An individual is considered resident for tax purposes if he or she stays continuously or discontinuously in the country for more than 183 calendar days including arrival and departure, during any period of 365 consecutive calendar days, with the understanding that when the continuous or discontinuous permanence in the country occurs in more than one taxable year or period, the person is considered as resident as from the second taxable year or period.

Foreign individuals are levied with income tax at the rate of 33 per cent. Foreign companies are levied with income tax at the rate of 39 per cent, however some withholding tax rates are lower than 39 per cent and, in some cases, and the income tax withholding is the final tax. The income tax for Colombian resident's individuals is based on a progressive rate that reaches a maximum of 33 per cent. For Colombian residents' companies the income tax is at a fixed rate of 25 per cent and there is the income tax for fairness tax (CREE) the rate of which is 9 per cent.

19 What restrictions, fees or taxes exist on the export of natural resources?

Export of natural resources is subject to general provisions applicable to all types of exports. In addition, the Ministry of Mines and Energy has the authority to establish restrictions on the export of non-renewable resources. Colombia is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and consequently export of such resources is subject to a licence from the Ministry of the Environment.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

No government approvals are required for project finance transactions. When the lender party is foreign, it must be included in the list of foreign lending parties recognised by the Colombian Central Bank.

21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Agreements that need to be registered with the National Registry (namely guarantee over movable assets agreements, pledge without possession agreements and guarantee trust agreements over movable assets) are not required to contain the notarised original signatures of the parties, however, it is advisable to notarise the original signatures. In order to be registered, the agreements do not need to comply with specific requirements, and even the guarantor can register a signed summary of the agreement. It is uncertain whether the guarantee trust agreements entered into by project companies that are of the type excluded by the general insolvency regime (which include urban utility services such as electricity, water and sewage, among others), need to be registered with the National Registry, but it is advisable to register them. Mortgage agreements and guarantee trust agreements over immoveable assets must be contained in a public deed executed before a public notary. Public deeds are to be granted in Spanish.

Pledge with possession agreements are not required to be in written form, however, it is advisable to execute a written agreement setting forth the rights and obligations of each party. Registration with the National Registry is required.

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Pursuant to Law 1563, 2012, international arbitration can be validly agreed to in Colombia, provided there is an international 'element' in the relationship of the parties to the arbitration agreement or their dispute.

Pursuant to Colombian law only disputes that can be settled can be subject to arbitration. Disputes that cannot be the subject of arbitration proceedings include:

- disputes concerning an individual's civil state;
- disputes concerning the validity of decisions issued by the shareholders' meeting or board of partners of certain commercial vehicles, such as corporations or limited liability companies;
- the validity of administrative acts (namely, resolutions or other acts issued by Colombian authorities); and
- collection procedures – enforcement of security such as pledges and mortgages shall always be brought before Colombian courts.

The general rule is that arbitration cannot be imposed by the law, and the decision to submit a dispute to arbitration shall come from both parties involved in the conflict. There is one event, however, in which disputes are automatically subject to domestic arbitration, and that is disputes between an employer and its workers.

Colombian courts are bound by article III(2) of the New York Convention for the enforcement of arbitration agreements. Colombian civil procedure rules are consistent with the rule contained in the Convention. Foreign arbitral awards can be enforced in Colombia once they have been recognised by the Colombian Supreme Court through exequatur, which follows the rules of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, approved in Colombia by Law 39 of 1990. In addition to this, Colombia is a party to the following conventions:

- the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention), approved by Law 44 of 1986;
- the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, (the Montevideo Convention) approved by Law 16 of 1981; and
- the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention), approved by Law 267 of 1996.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Financing documents are typically governed by foreign law (typically the laws of the state of New York). All agreements relating to security granted over assets located in Colombia are invariably governed by Colombian law.

Article 869 of the Colombian Code of Commerce provides that an agreement that is performed in Colombia is subject to Colombian law. Whether party autonomy can alter this conflict of law rule is debated. Under Colombian law any agreement, including those performed in Colombia, can be subject to foreign law if the parties have agreed to submit their disputes to international arbitration (provided said stipulation is valid due to the existence of an international 'element' as defined under Law 1563, 2012). In addition, the title over property located or registered in Colombia is also subject to Colombian law.

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Submission to a foreign jurisdiction is effective and enforceable, although it does not derogate the jurisdiction of Colombian courts over the matter, where Colombian law grants them such jurisdiction. However, any decision obtained abroad must be recognised by the Colombian Supreme Court through exequatur, under the rules established in the Code of Civil Procedure (and as of the date yet to be determined by the Superior Counsel of Judiciary in the General Procedure Code).

Waiver of immunity of the Colombian state is not effective and enforceable unless provided under a treaty that has undergone all the steps and approvals provided under the Colombian Constitution to be effective.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

As a general rule, pursuant to article 57 of the Labour Code, employers are required to provide employees with all the protection required to protect them from the health and safety risks involved in the tasks they perform. Resolution 2400, 1979 issued by the Ministry of Labour is the main regulation that provides particular health and safety rules for each type of risk. The Ministry of Labour administers those laws, may investigate complaints filed by employees and can impose fines if applicable rules are not complied with.

With regard to environmental laws, these are of a general nature and are provided mainly under Law 99, 1993, Decree 2811, 1974 and Decree 2841, 2014. In addition, there are specific rules applicable to mining under the 'Environmental Guides' issued by the Ministry of the Environment. The Ministry of the Environment, as well as local environmental authorities, which includes the Regional Autonomous Corporation and District Authorities (eg, the District Department of Environment in Bogotá), are charged with overseeing compliance with these rules, and have the authority of granting environmental licences and approvals when required by law.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Companies that provide public utility services are required to take the form of any of the business vehicles provided under local law in which the capital of the company is represented in shares (corporation, partnership limited by shares, and a simplified stock company).

The most common form for project companies is the corporation; however, with the introduction of a new simplified corporation in December 2008, which has a very simple corporate structure and is not subject to many of the limitations provided under the law for corporations, this trend has changed.

The principal sources of financing for project companies are foreign banks, multilateral agencies (such as, the Inter-American Development Bank, the International Finance Corporation, Corporación Andina de Fomento and DEG) and local banks. Other sources of financing are the issue of Rule 144A Regulation S bonds, securitisation of assets and the issuing of local debt.

Public-private partnership legislation

27 Has PPP enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Paragraph 2 of article 32 of Law 80, 1993 provided that any individual or company interested in entering into concession contracts for the construction of public works had the right to submit a proposal to the respective state entity, which should include at least the description of the work, its technical and financial feasibility and its environmental impact evaluation. Also, it provided that the state entity had a three-month term to evaluate the proposal and determine if the proposal was feasible. This provision applied to all government levels (national, local and municipal) and was limited to public works. This was a very limited regulation and, as such, the public-private partnerships were poorly developed and used.

Another form of PPP was authorised by the Constitution and by Law 489 of 1998, which authorised the creation of public-private partnerships at any level of government, by authorising the creation of 'mixed economy companies', which are companies in which the capital is held by a state entity and private individuals or entities. The legislation is not industry-specific. Law 489 is set up in different ways to involve the private entities in the planning, execution, construction and maintenance of the work.

Law 1508, 2012 was enacted by Congress on 10 January 2012 and provides the general legal regime of public-private partnerships in Colombia. Law 1508, 2012 was regulated by means of Decree 1467, 2012. In general terms, the Decree regulates the form in which PPPs of private and public initiative shall be structured. By the same token, Resolution 3656, 2012 enacted by the Director of the National Planning Department on 20 December 2012 set forth the parameters, applicable to public entities, to evaluate PPP projects. Law 1508 repealed article 32 of Law 80 of 1993.

In Colombia, as a general rule, the state may enter into agreements with private individuals. Concession agreements among state entities and private individuals are often entered into to provide a public service, the development or modernisation of which cannot be afforded by the public entity for the provision of public goods and its related services in a more cost-efficient way. In these agreements risk is allocated among the parties as well as the payment mechanisms. Under a concession agreement, a private entity or an individual is granted the right to exploit a public asset in exchange for the state's participation in a percentage of the earnings.

In 2013, Congress enacted Law 1682 of 2013 whereby the regulatory framework for transport infrastructure was established. Law 1682 provides that any private party may request permission for the development at their own risk of transport infrastructure projects of public interest.

PPP – limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

Law 1508, 2012 provides, as a general rule, that the PPPs may only be used in projects where the required investment is higher than 6,000 minimum legal wages (approximately US$1.933 million). In addition, the PPPs will have a maximum term of 30 years, including extensions, and the public participation shall not exceed 20 per cent of the estimated investment. Law 1607, 2012 provides a five-year exception counted from the date when the PPP is approved regarding the minimum required investment for projects developed in the Department of San Andres, Providencia and Santa Catalina.

Concession agreements are the most common structure used in PPP transactions, which are regulated under Law 80, 1993 and Law 1150, 2007. Law 80 and Law 1508 provide that, as a general rule, the selection of the private contractor by a state entity is to be carried out by means of a public procurement process summoned at the state entity's or a private contractor's initiative. In addition, concession agreements are strictly regulated, which means that, among other legal provisions, there are several stipulations that are deemed to be included in them even if the parties fail to include them expressly, mainly:

- the state entity has the right to unilaterally modify, terminate or interpret the agreement to prevent the paralysis of the delivery of the public service to which the agreement relates; and
- all the infrastructure built and the assets used by the concessionaire to perform the agreement are transferred to the state entity when the term of the agreement expires.

Under concession agreements the concessionaire is required to pay monetary consideration, which usually consists of a percentage of the revenues obtained from the development of the projects.

The public functions or duties that involve the exercise of authority cannot be transferred to private entities or individuals.

Law 1508, 2012 and Decree 1467, 2012 set legal limitations on PPPs. According to this regulation, private contractors' initiative for PPPs in the following projects is prohibited:

- those that modify existing concession agreements;
- projects already structured by public entities; or
- projects that require the state to grant a guarantee or a disbursement from the general budget of the nation, territorial entities or other public funds higher than those set forth in Law 1508, 2012.

PPP – transactions

29 What have been the most significant PPP transactions completed to date in your jurisdiction?

Concession agreements are traditionally used to finance and foster the development of basic infrastructure with the intention of promoting development in the country. In the past few years many PPP contracts have been awarded, mainly by the Agencia Nacional de Infraestructura, among which we consider the following to be relevant:

- the operation and modernisation of Bogotá Airport, the country's most important airport;
- the operation and modernisation of Barranquilla's airport, serving one of Colombia's main cities;
- the design, construction, operation and maintenance of the Santana-Mocoa-Neiva highway with a total investment of 994,891,481,560 Colombian pesos;
- the design, construction, operation and maintenance of the Villavicencio-Yopal with a total investment of 1,294,380,424,009 Colombian pesos; and

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- the construction of a new lane for the Bogota-Villavicencio highway in the Chiraja-Fundadores sector with a total investment of 2,185,031,662,470 Colombian pesos.

Regarding PPP projects generated by private parties, few have been approved to date. We consider that these are among the most relevant:

- the design, construction, operation and maintenance of the Granada-Villavicencio-Puerto López-Puerto Gaitán-Puente Arimena-Anillo Vial de Villavicencio and city access roads was granted to Grupo Odinsa with an investment of 3,200,531,909,579 Colombian pesos; and
- the design, construction, operation and maintenance of the second lane for the Ibague-Cajamarca highway, and the operation and maintenance of the Chicoral variant, Gualanday variant, Gualanday-Ibagué, Gualanday-Espinal, Picaleña variant, Ramal Norte and the existing road, Ibagué-Cajamarca, awarded on 12 February 2015 with a total investment of 1,860,649,586,531 Colombian pesos.