Doing Business in Colombia

Colombia

Baker & McKenzie

2004

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Introduction

Strategically located in the American continent in the northeastern corner of South America, Colombia has extensive coastlines on the Pacific and Atlantic oceans and is bordered by Venezuela, Brazil, Peru, Ecuador and Panama. With ports on the Atlantic and Pacific to serve Europe, North America and the Pacific Basin countries and good overland routes, Colombia is considered the gateway to South America. It has made further use of its unique geographical position by focusing on foreign trade. Liberalization of the markets in the early 1990s meant a reduction of customs duties for imported goods and a modernizing of the infrastructure of the country. Colombian products enjoy preferential or zero tariffs with other members of the Andean Community, the European Union, Chile, the Caribbean Community countries, the US, and Venezuela and Mexico pursuant to the G3 Agreement. There are currently seven free trade zones and four Special Economic Export Zones, all of which offer exemptions from duties for imported goods and materials, subject to certain conditions. The influence in Andean Community legislation is seen not only in trade tariffs, but also in the intellectual property area and increasingly in the regulation of the pharmaceutical and agrochemical industries, among others.

Colombia is the third largest country in Latin America in population terms after Brazil and Mexico, with the fifth largest economy. It has a largely urban population with over seventy per cent living in the cities, the largest being the capital city Bogotá D.C. followed by Medellín, Cali and Barranquilla. Colombia boasts a highly skilled and competitive work force, with well qualified and experienced managers.

Colombia has one of the longest standing democracies in the South American continent and is a country that has enjoyed financial stability, through the adoption of orthodox financial management practices over the last sixty years. In 1991 a Constitutional amendment was adopted aimed at providing the country with a more modern institutional framework, mechanisms to maintain economic stability, including making the central bank independent from the executive, legislative and judicial branches of the state and improving the efficiency and transparency of the different state entities. Despite its serious public order problems in some parts of the country and an extended period of recession, which ended recently, it remains an attractive destination for investment and is for many multinationals the center of their operations in South America. Low inflation, cheap credit and falling prices have meant many sectors of the economy remain extremely competitive. The present government under President Alvaro Uribe, which took office in August 2002, has adopted measures to overcome some of the problems facing Colombia, including internal and external financing measures and specific action to make more efficient use of public funds. It has enacted structural reforms in employment, pension and tax matters, among others and has continued to

maintain the economy within the economic guidelines recommended by the International Monetary Fund. Colombia remains one of the most stable countries in the region.

Foreign Investment Regime

The 1991 Constitution modified the institutional structure for monetary policy and exchange rate management and granted independence to the central bank, *el Banco de la República*, thereby releasing it from pressure from the government and the private sector regarding the handling of monetary and exchange rate matters. The Board of Directors of the central bank is the maximum authority on monetary and exchange matters.

Under the Constitution and present foreign investment regulations, foreign investment in Colombia shall receive the same treatment as investment made by Colombian nationals. The conditions for reimbursement of foreign investment and remittance of profits in effect at the time the investment is registered may not be changed so as to effect foreign investment adversely, except on a temporary basis when the international reserves are lower than three months of imports. Discriminatory treatment or special conditions may not be imposed on foreign investors as compared to Colombian nationals, nor may the treatment be more favorable. Any investment made by a non-resident foreigner in Colombia will qualify as foreign investment, provided it meets the requirements below.

Permitted investments

Foreign investments are permitted in all areas of the economy with the exception of activities related to defense and national security and the processing and disposal of toxic, dangerous or radioactive waste not generated in the country.

Form of investment

Foreign investment may be made in the following forms:

a. Imports of foreign currency freely convertible into Colombian currency;
b. Imports of tangible goods such as machinery, equipment or other tangible assets that are contributed to the capital of an enterprise as non-reimbursable imports and those goods brought into a duty free zone and which are contributed to an enterprise located in said zone;
c. Contribution in kind to the capital of an enterprise, consisting of intangibles, such as technological contributions, trademarks, patents, as set forth in the Colombian Commercial Code.
d. Funds in Colombian currency which are entitled to be remitted abroad, such as principal and interest on foreign loans, sums owed for reimbursable imports, remittable dividends and royalties deriving from contracts duly registered and which are destined for direct or portfolio investment.

e. Supplementary investment to assigned capital of branches of foreign companies.

Prior approvals and registration

As a general rule, foreign investments in Colombia do not require prior government approval. With very few exceptions, foreign investors are allowed to control one hundred per cent of the capital of a company or corporation with no prior approval and with no obligation to divest their investment.

Foreign investments must be registered before the Central Bank either automatically on entry of currency into the country or automatically upon filing of the relevant documents. In some cases registrations must be made within the three months following the date on which the investment was made, which term may be extended on request for a further three months. Registration of the foreign investment grants the foreign investor remittance and repatriation rights: The failure to report or register will result in the imposition of fines by the pertinent agencies. The registration of foreign investment must be annually updated with the central bank.

Portfolio investments

Portfolio investments in Colombia must be made through a foreign investment fund having as sole purpose the performance of portfolio operations in the public stock market.

Investments in the banking sector

Foreign investments in the banking and insurance sectors are permitted, prior authorization of the Banking Superintendency and there is no limitation as to the amount of shares or capital that a foreign investor may hold in a bank, financial institution or insurance company

Bilateral investment treaties

Following the elimination in 1999 of the provision in the Colombian Constitution allowing expropriation without compensation in certain cases, Colombian is in the process of negotiating approximately thirty bilateral investment treaties with countries from all over the world. A treaty has been signed with Chile and there are negotiations currently underway to sign a free trade treaty with the U.S. which could have far reaching effects on certain sectors of the economy, such as telecommunications and intellectual property. The treaties seek to promote and protect investment, especially in relation to dispute resolution, and liberalize trade barriers.

Exchange Regime

General rules

There are two basic exchange markets in Colombia; the exchange market, comprising foreign currency that must be conducted through the so-called intermediaries of the exchange market (i.e., Colombian banks, financial institutions and exchange houses), and the free market, comprised of foreign currency held by Colombian residents derived from operations that are not required to be conducted through the exchange market.

Pursuant to regulations issued by the Board of Directors of the central bank, the following operations must be conducted through the exchange market:

a. Imports and exports of goods;
b. Foreign loans and earnings related thereto;
c. Foreign investment in Colombia and earnings related thereto;
d. Colombian investment abroad and earnings related thereto.
e. Financial investments in securities issued or assets located abroad and earnings related to them, except when investment is made with currency originating from free market operations;
f. Avals and guarantees in foreign currency; and
g. Derivative operations.

All other operations in foreign currency may be conducted either through the exchange market or through the free market.

Exchange declaration

Colombian residents and foreign residents who perform an exchange operation in Colombia must complete an exchange declaration. The exchange declaration must be submitted to a commercial bank or authorized financial institution, which will then forward it to the central bank.

Foreign loans

Colombian residents are allowed to obtain foreign loans only from foreign financial institutions approved by the central bank, regardless of the term of the loan and the destination of the foreign currency. Direct inter company loans granted by non-Colombian parent companies to their Colombian subsidiaries are not permitted under the present exchange regulations. However Colombian subsidiaries may loan funds to their foreign parent companies.

Prior to any disbursement, the borrower of a foreign loan is required to make a peso deposit with the Central Bank complying with the provisions established by the Board of Directors of the Central Bank. Currently the requirement is for a deposit of 0% of the amount of the loan. The deposit, when required, may be redeemed in advance but certain discounts would apply. The debtor must report the foreign indebtedness to the central bank.

Loans granted by Colombian residents to foreign residents are not subject to the aforementioned deposit.

Imports

Payment of imports must be conducted through the exchange market and imports may be financed by the supplier of the product, by foreign financial institutions and by Colombian banks and authorized financial institutions. If the term of financing exceeds six months, the operation must be registered at the central bank as a foreign loan if the value exceeds US$10.000. The deposit mentioned above would not apply.

Exports

Payments for exports must be conducted through the exchange market. Advance payments and pre-financing of exports are permitted. If the term of financing exceeds twelve months, the operation must be registered at the Central Bank as a foreign loan for exports of more than US$10,000. The deposit mentioned above does not apply.

Derivative and peso-foreign currency operations

Forwards, financing, swaps, options, combinations of the aforementioned transactions, caps, floors and collars, are authorized.

Foreign currency accounts

Colombian residents are allowed to maintain accounts in foreign currency abroad for the performance of all types of operations. If the account is used to perform operations that must be conducted through the exchange market, then the foreign currency account must be registered with the central bank as a "compensation" account and the movements reported to the central bank and to the tax authorities.

Special regime for hydrocarbons and mining

A special regime is available for branches of foreign companies operating in the exploration and exploitation of oil and natural gas, the mining of coal, nickel and uranium, or rendering technical services to the exploration and exploitation of oil. Under such regime, these branches are allowed to receive payments in foreign currency in Colombia and to maintain the foreign currency that they receive from their operations, without the obligation to convert such foreign currency into pesos. Conversely, they do not have access to the exchange market to acquire foreign currency (and, under the current position of financial regulators, cannot directly incur in foreign indebtedness).

Corporate Structures

The Colombian Commercial Code provides for a number of structures that are available for those interested in doing business in Colombia. The structures include schemes where the liability of the owners or shareholders is unlimited, and schemes where such liability is, as a general rule, limited to the amount of the contribution of the owner or the shareholder to the capital of the given entity.

Unless there are special reasons for a foreign entity to assume unlimited liability in Colombia, the most suitable entities for commercial purposes are the corporation, the limited liability company, and the branch of a foreign company. All of these entities benefit from a clear division between capital and responsibility, limiting, as a general rule, the liability of the investor to the amount of its participation. The main characteristics of these entities are described below.

Corporation (*sociedad anónima*)

Shareholders

A minimum of five shareholders (either individuals or entities) is required to form a corporation. No shareholder may hold 95% or more of the shares of a corporation at any one time. As a general rule, the liability of each shareholder is limited to the amount of its capital contribution. Shareholders may have to disclose and register a situation of control as discussed on Section 3.5.1. below.

Capital

The capital of the corporation is divided into shares of equal value. The capital of a corporation is classified in three categories:

a. Authorized or stated capital represents the total number of subscribed shares plus the amount of shares that are in reserve, if any.

b. Subscribed capital represents the shares that have been issued to the shareholders. The subscribed capital may never exceed the corporation's authorized capital. Any issuance of shares over and above the authorized capital requires a prior increase in authorized capital, by an amendment to the bylaws.

c. Paid-in capital represents the shares paid by the shareholders. Upon incorporation of a corporation, at least 50% of the authorized capital must be subscribed for, and at least one third of the value of the issued shares must be paid. The remainder must be paid within one

year of incorporation. Further increases of authorized capital do not require subscription of any particular percentage of capital.

Shares

The shares of a corporation are freely negotiable. The main exception to free negotiability is the right of first refusal, if provided for in the bylaws. In general, any stipulation in the bylaws limiting or eliminating the free negotiability of the shares shall be null and void.

Where the corporation has shares in reserve, the issuance of new shares requires approval from the corporate body indicated in the bylaws (as a general rule the board of directors), which must set forth the specific terms and conditions of the relevant issuance. The issuance of shares is subject to a right of first refusal by the existing shareholders, however, the bylaws may provide otherwise and the shareholders may waive their right to subscribe, or assign it to a third party.

Corporate bodies

Shareholders meetings.

Ordinary or extraordinary shareholders' meetings can be held and each share entitles shareholders to one vote at any meeting of the shareholders. In order for a shareholders' meeting to have a valid quorum to deliberate and decide, the presence of two or more shareholders who represent at least 50% plus one of the subscribed shares (i.e. absolute majority) is required, unless a higher majority or different quorum is provided for in the law or bylaws.

If a meeting fails to take place for lack of quorum, the quorum and majorities required for the second meeting is a plural number of shareholders irrespective of the number of shares they represent.

Proxies to attend meetings on behalf of shareholders of entities already incorporated may be granted for one or more meetings, provided that the powers of attorney are granted in writing and specify the meetings for which they are granted. Powers of attorney granted abroad for these purposes do not require authentication or legalization.

Board of directors.

A corporation must have a board of directors composed of at least three principal members and

three alternates, who do not need to be shareholders, and who are appointed by the shareholders. Directors are elected by electoral quotient system. [1]

In principle the attributions of the board of directors can be freely stipulated in the bylaws and unless there are express limitations in the bylaws, the law presumes that the directors have all necessary powers for the corporation to carry out its corporate purposes. However, the law does establish certain powers which must always be exercised by the shareholders and which cannot be delegated to the board, for example decisions to adopt bylaw amendments, or distribute profits.

Legal representative.

A corporation must have a legal representative, usually the general manager, who must have at least one alternate. The day-to-day operations of the corporation are entrusted to the manager, who must always act within the powers granted in the bylaws. The law assumes that the manager is authorized to represent the corporation and to act on behalf of the corporation in any and all acts within the scope of the corporate purpose of the corporation, with no limitation whatsoever, except for the limitations expressly provided for in the bylaws.

Statutory auditor.

A corporation must have a statutory auditor. The statutory auditor has authority to verify compliance with the bylaws, and with the decisions of the shareholders and the board of directors and inspect the accounting books and other documents of the company to comply with his functions.

Profits and reserves

At the ordinary annual general meeting, the board of directors submits the financial statements of the corporation for the previous fiscal year to the shareholders for approval. Once they have approved the financial statements, the shareholders, determine the allocation of the corporation's distributable profits, if any, for the preceding year. Ten percent (10%) of the corporation's net profits

[1] This system consists of dividing the number of voting shares at the meeting by the number of directors to be elected to obtain the electoral quotient (the "EQ"). For example, if there are 5 directors and 100 votes the EQ will be 20. A list of candidates is submitted by each shareholder or group of shareholders. The number of votes obtained for each list is divided by the EQ to determine how many times the EQ has been covered by the votes. For each time the EQ has been covered by the votes cast on any given list, one candidate on that list will be elected. Where a position of director remains to be filled, the list with the highest remainder will elect the director, and so on until all the directors have been appointed.

must be allocated to a legal reserve until such reserve reaches an amount equal to at least 50% of the subscribed capital of the corporation. The remainder of the net profits, if any, is allocated as determined in the bylaws or by the shareholders and may be distributed as dividends. The corporation must distribute as a dividend at least 50% of its annual profits unless 78% of the shareholders vote otherwise, or if the total amount of all reserves of the corporation exceeds the corporation's outstanding capital, it must distribute 70% of its annual profits.

Limited liability company (*sociedad de responsabilidad limitada*)

Partners

A minimum of two partners (either individuals or entities) contributing capital is required to form a limited liability company. The maximum number of partners permitted is twenty-five. As a general rule, the liability of the partners is limited to the amount of their capital contribution, however: (a) the bylaws may provide for a greater responsibility of some or all of the partners; (b) a Supreme Court decision considered that the partners of a limited liability company are jointly and severally liable for the employment obligations towards the company's employees; and (c) tax law provides that partners of a limited liability company are jointly and severally liable for all income tax obligations of the company. In practice, however, it is rare for the Supreme Court decision on employment liability or the provision relating to income tax to be applied.

Capital

The capital of the company is divided into shares of equal value. The capital of the company must be entirely paid-in on incorporation and every time a capitalization takes place the corresponding article of the bylaws must be amended. Such amendment must be formalized by means of a public deed and the amount of the capitalization must be paid upon formalization of the decision.

Shares

Partners are entitled to transfer their shares, but all other partners have a statutory right of first refusal proportional to their existing participation unless the bylaws provide otherwise. Negotiations must take place as to the price and term of payment for the shares and where the partners fail to agree, any outstanding matters will be referred to experts. If any partner does not exercise the right of first refusal, the transfer of shares to third parties will require authorization from the partners' meeting. If this authorization is not given, the company must locate one or more purchasers within the next 60 days and negotiations as to the price and term of payment for the shares must take place in the same way as for an interpartner transfer. If the sale is not perfected twenty (20) days after notice of the prospective purchaser is given to the partners, the partners must decide whether to

exclude the partner desiring to sell his shares or dissolve the company. Transfer of shares in a company is a bylaw amendment that must be made by means of a public deed.

Corporate bodies

Partners' meetings

The partners may hold ordinary or extraordinary meetings and, as in the case of a corporation, each share entitles partners to one vote at any meeting of the partners.

The rules regarding quorums and the granting of proxies are the same as those discussed above for corporations.

In addition to those granted to the shareholders in a corporation, partners have the following powers:

a. To decide on every aspect of transfer of shares, as well as the entrance of new partners;
b. To decide on the retirement and exclusion of partners;
c. To order appropriate actions against any person who has failed to perform their obligations, or caused loss or damage to the company; and
d. To delegate the representation and the administration of the company to a manager.

Board of directors

Even though limited liability companies may have a board of directors, this is not mandatory as in the case of a corporation; therefore all decisions may be adopted directly by the partners and the general manager, when he or she has been granted such authority.

Legal representative

A company may be managed directly by the partners or they may decide to appoint a legal representative, usually the general manager, who must have at least one alternate. As in the case of corporations, the manager must always act within the powers granted to him/her in the bylaws. The law assumes that the manager is authorized to represent the company and to act on behalf of the company in any and all acts within the scope of the corporate purpose of the company, with no limitation whatsoever, except for the limitations expressly provided for in the bylaws.

Statutory auditor

Unlike corporations, companies are not required to have a statutory auditor, unless assets or income of company exceed certain limits established by law (i.e., if the gross assets of the company at the end of the preceding year exceed or are equal to 5.000 minimum legal wages, or if its gross income in the preceding year exceeds or is equal to 3.000 minimum legal wages). The partners may freely decide to appoint a statutory auditor and if so, this should be included in the bylaws.

Profits and reserves

The same rules mentioned for corporations apply to companies.

Limitations

The shares of limited liability companies may not be traded in the stock market. Banks, insurance companies and public utilities may not be limited liability companies but must be corporations.

Branch of a foreign company (*sucursal*)

Need to establish a branch

Under the rules of the Commercial Code of Colombia, foreign companies intending to carry out permanent activities in Colombia directly must establish a branch in Colombian territory.

Not an independent legal entity

From a legal point of view, a branch is not considered an independent legal entity but an extension or commercial establishment of its home office. The basic difference between a branch and a subsidiary is that the branch is the same legal person as its home office, (although the branch is considered as a legal entity which for purposes of its activity has to comply with all Colombian regulations), whereas the subsidiary is an independent legal entity, incorporated under the laws of Colombia and therefore, a Colombian company.

Capital, corporate bodies and legal representation

A branch is established by a decision (usually a resolution) of the pertinent corporate body of the home office abroad, which must indicate the corporate purpose of the branch, designate an amount

of assigned capital to the branch and appoint the legal representative and alternates. This corporate body of the home office outside Colombia decides all other pertinent issues relating to the branch although it can delegate as necessary to the legal representative or attorneys in Colombia. These representatives can be granted the same powers as a legal representative of any other corporate structure.

Statutory auditor

The appointment of a statutory auditor is mandatory in the case of branches of foreign companies.

Issues to consider in selecting the most appropriate corporate structure

Funding capital and shares

There is no minimum capital required for the incorporation of any of the above types of entities, however, as regards capital, different provisions apply to each:

In limited liability companies every capital increase requires an amendment to the bylaws of the company. Such amendment must be formalized by means of a public deed and the amount of the capitalization must be paid in upon such formalization. On the contrary, a corporation may have an authorized capital greater than its subscribed and paid-in capital, therefore only capitalizations for amounts greater than the authorized capital would require an amendment to the bylaws. If new shares are to be subscribed without exceeding the authorized capital, no amendment to the bylaws is required, but the pertinent corporate body (usually the board of directors) must approve a regulation issuing the shares (*reglamento de colocación de acciones*).

Transfer of shares in a limited liability company always implies an amendment of the bylaws, which amendment must be approved by the affirmative vote of two or more partners representing at least 70% of the equity capital of the company and requires the granting of a public deed. Shares of a corporation may be freely negotiated by shareholders (subject to any preferential right in the bylaws) and the transfer will not imply an amendment to the bylaws, but will merely require endorsement of the share certificate and registration in the shareholders' register.

Any increase of the assigned capital of a branch requires an amendment of the incorporation document by the pertinent corporate body abroad. The amended document must in turn be formalized by a public deed in Colombia. Alternatively the branch may receive supplementary investment to its assigned capital from its home office abroad. This supplementary investment does not alter the assigned capital of the branch and therefore does not require the amendment of the incorporation document. The funds are registered in the branch's accounts in the "supplementary investment to assigned capital" account and is managed as a current account between the branch

and its home office. The only formality required is an annual registration of all supplementary investment received from the home office in the preceding financial year, making this a very easy and efficient method of funding the branch.

In addition the losses of a branch can be easily absorbed by the home office thereby avoiding the compulsory liquidation of the branch when losses have reached levels indicated in the law. This can be very useful for an entity that is a cost center and does not generate income to sustain itself. In the case of subsidiaries, the absorption of losses can be more complex.

Liability

Although all corporations and companies have legal personality once they are duly incorporated, and even though shareholder/partner responsibility is limited in principle to the amount contributed to the entity concerned, a Supreme Court decision exists which considers that the partners of a limited liability company have joint and several liability for the employment obligations towards the company's employees.

As far as tax liability is concerned, tax law provides that partners of a limited liability company are jointly and severally liable for the principal of all income tax obligations of the company.

The liability of shareholders/partners or owners will become joint, several and unlimited where certain provisions of the law are not complied with, for example failing to use the words or initials referring to the structure of the entity (*S.A., Ltda*.).

Control

Each type of entity has certain advantages depending on the structure preferred and level of control or speed of reaction required.

A corporation has a clearly defined division between shareholders and directors, which enables an efficient, and locally oriented management. The same is true of a limited liability company where board members, if any, or local representatives are given sufficient decision making powers.

At the other end of the spectrum, a branch is managed from the pertinent corporate entity of the home office abroad and therefore decision making in Colombia may be extremely limited. Resolutions of the home office require legalization up to the Colombian Consul/Apostille authorities and registration in the Chamber of Commerce and in the case of a bylaw reform, formalizing in a public deed, before having any effect in Colombia. Therefore, any reform to the incorporation document or any appointment of representatives will require advance planning.

Legal capacity

As a general rule, legal entities in Colombia can carry out any and all acts that are legal and are related to their corporate purpose, as described in the bylaws.

Parent companies and subsidiaries - business groups

Colombian entities must disclose the links that they have with parent or controlling companies, and disclose the existence of a business group.

Control

An entity is subordinated or controlled:

a. When its decision-making power is subject to other persons, the parent company or controlling company, either directly, in which case the controlled company is called an affiliate, or indirectly by using subordinated companies of the parent or controlling company, in which case the controlled company will be a subsidiary.

b. When more than 50% of the capital belongs to the parent company, directly or through the use of subordinated companies, or their subordinates;

c. When the parent company and its subordinates either jointly or separately have the right to cast votes constituting the minimum majority required for partners' or shareholders' meetings, or have the number of votes required to elect the majority of the board of directors where this exists;

d. When the parent company, either directly, or through its subordinates exercises a dominating influence on the decisions of the management of the company by reason of any act or contract with the controlled company or its partners/shareholders.

Business groups

A business group exists when entities have a unified purpose and management, (i.e. when the existence and activities of all entities pursue an objective determined by the parent or controlling company by virtue of its command over the group), in addition to the connection of subordination.

Registrations and reports

Where a situation of control arises, or an entity forms part of a business group, the controlling company is required to register a private document stating the name, domicile, nationality, the activities of the connected companies, together with the reason for such control or business group situation in the Chambers of Commerce having jurisdiction over the domicile of each of the connected companies. The relationship of subsidiary or affiliate and the parent company, and any modifications thereto must appear on the Chamber of Commerce certificate issued for each entity. Failure to carry out said registration may result in fines. A debate is ongoing regarding the applicability of these rules when the controlling entity is not incorporated in Colombia.

In the events of business groups, managers of both the controlled companies and the controlling company must submit a special report to the shareholders or partners in the annual ordinary general meeting, which must state the intensity of the economic relationship between the controlling company and its affiliates or subsidiaries with the respective controlled company. It must also include the most important operations carried out in that financial year between said companies, either directly or indirectly, the most important operations carried out between the controlled company and other entities as a result of the influence or interest of the controlling company, and those carried out between the controlling company and other entities in the interests of the controlled company.

Acquiring a Business in Colombia

A business in Colombia may take several forms, depending on the interest of the parties. These include the incorporation of companies by the relevant investors, the purchase of shares by a new member from another member in an existing company, the issuance of new stock or the merger of entities. The incorporation of new companies has already been addressed in the previous chapter; this chapter briefly discusses the main legal issues of the other three main transactions that frequently take place in Colombia.

Mergers

The company's shareholders (or partners) must approve the proposed merger agreement. Unless otherwise provided for in the bylaws, the decision must be approved with a simple majority of the shareholders/partners represented at the meeting. Absent or dissenting shareholders/partners may withdraw from the company within eight (8) days following the meeting in which the merger agreement is approved, if their rights are adversely affected

The legal representatives of each of the companies must publish the merger proposal in a newspaper with nationwide circulation and notify all creditors of the merger. The company's creditors have the right to demand sufficient satisfactory guarantees for the payment of their credits and the merger process may be suspended until sufficient guarantees are presented or until payment of the credits, if necessary.

Administrative authorizations may be required, if any of the merging companies are subject to government surveillance (i.e. by the Securities Superintendency, the Banking or companies Superintendency, etc) and/or antitrust clearance may be required, in which case the procedure described under section 0 below should be followed.

Upon authorization from the governmental authorities, if required, the companies must incorporate the agreed merger into a public deed together with the financial statements and other documents related to the merger and amend the surviving company’s bylaws. This must be registered in the Chamber of Commerce and all pertinent notifications made.

Asset purchase (acquisition of an ongoing business)

There are no special voting majorities required by law to dispose of a major part of the assets of a company, but the bylaws usually establish limitations or requirements in this regard.

If the sale involves real estate, it must be incorporated into a public deed, which must be registered

before the real estate registry. If the sale does not involve real estate, it may be carried out by public deed or private document. In any case, the seller must deliver financial statements for the business establishment, properly identifying the liabilities, duly certified by a public accountant.

The document evidencing the sale of the business establishment must be registered before the corresponding Chamber of Commerce.

Notice of sale must be given to all creditors of the business establishment through publication in newspapers. Creditors have a term of two (2) months to oppose the sale of the assets (by registration before the commercial registry) and to demand guarantees or security for the payment of their credits.

There are no administrative authorizations required, unless it is deemed that the transaction requires antitrust clearance, in which case the procedure described under section 0 below should be followed.

Issuance of shares

The decision to capitalize the company usually requires a simple majority of the voting stock present at the relevant shareholders' meeting, although the bylaws may provide otherwise. However, the waiver of preferential rights to subscribe shares (and thus allow entry to a third party) requires a special majority of 70% of shares represented at the meeting.

The decision to capitalize a company requires an amendment to the bylaws for a limited liability company and for a corporation if there is insufficient "authorized capital". In either case the bylaws must be raised to a public deed.

There are no governmental authorizations required except where non-voting or preferred stock is created.

Because capital contributions are made to the company and not to its shareholders or partners, parties may consider a subsequent capital reduction, so that the shareholders or partners receive part of the money contributed into the company. However, capital reductions of this nature are subject to government approval, with stringent requirements.

Public company take over

Any public offering of securities must comply with the disclosure requirements provided for by the Securities Superintendency and must be authorized by said Superintendency. The prospectus must contain all such information as investors and their professional advisors would reasonably require

and reasonably expect to find in the prospectus for the purpose of making an informed investment decision.

Any public offering of securities in a company registered in a stock market that exceeds a certain threshold must be carried out within the given stock market. There are some exceptions to this rule, including (a) the reacquisition of shares by issuer, (b) the purchase of shares of Colombian companies registered in a foreign stock exchange when such purchase will be carried out abroad, (c) the transfer of stock among entities controlled by the same ultimate beneficiary, and (d) the purchase of shares of foreign companies registered in Colombia when such purchase will be carried out abroad. Purchases made by and between the same parties within a term of 120 days, in connection with securities from the same issuer and on similar terms and conditions, are deemed to be a single operation.

Whenever a person, directly or indirectly, (a) is to become a holder of 10% of the total outstanding shares of a company with its shares listed in a securities exchange or (b) already holds over 10% of the outstanding shares of such a company and intends to increase its ownership by 5% or more, such person must acquire the shares through a public tender offer addressed to all shareholders and comply with applicable requirements, unless the current shareholders approve the acquisition unanimously.

If as a result of a merger or spin-off any person meets the percentages described in the above paragraph, any shareholder of the company involved may, within the six months following the public notice of the merger or spin-off, demand that the person meeting the percentages make an offer to sell for the same amount acquired through the merger or spin-off, unless within that time-frame the acquirer has disposed of the shares exceeding the referred percentages.

If the party making the offer to acquire shares is making a tender offer in exchange for shares or other securities of another company, the securities must meet certain requirements and the offer must comply with additional disclosure requirements, as provided for under the applicable provisions.

Antitrust clearance

An antitrust filing will be necessary only when the intended transaction meets either of the two following conditions:

a. The transaction involves, in the aggregate, more than 20 percent of the relevant market, measured in terms of sales during the year immediately before the year in which the proposed transaction is to take place; or

b. The aggregate of the total assets of the entities involved in the transaction exceeds the amount equivalent to 50,000 monthly minimum legal wages at the time when the transaction is concluded.

If the proposed merger or acquisition is not within one of the above two categories, no filing with the antitrust authorities (Superintendency of Industry and Commerce) shall be required in order to obtain antitrust clearance. The antitrust authorities will not challenge these transactions, provided that the legal representatives of the companies involved in the proposed merger or acquisition inform their relevant governing bodies (i.e., board of directors or shareholders) why antitrust clearance is not required and that such governing body concurs. The analysis made by the companies to establish if the transaction qualifies under the "general authorization" regime must be sufficiently documented, in case the antitrust authorities question why a filing was not made.

When antirust clearance is required, it should be issued unless the antitrust authorities conclude that it will constitute a mechanism to obtain a dominant position in the market in order to have the power to determine, directly or indirectly, the conditions in that market. However, even if a dominant position will be obtained as a result of the transaction, the antitrust authorities cannot object when the parties involved can prove that the transaction will bring significant improvements in terms of efficiency and costs, and that this saving would not be achievable otherwise, and it would not result in a restriction of free competition in the market.

The acquisition of control of a local company or enterprise by a foreigner is subject to antitrust clearance if the transaction affects the Colombian market. Likewise, mergers, integration, consolidations or acquisitions of control taking place outside Colombia, but having an effect in the Colombian market may also be subject to antitrust report and clearance.

Mergers, consolidations, integrations or acquisitions of control implemented without obtaining prior antitrust clearance are subject to the imposition of a penalty consisting of a fine of up to the equivalent to 2,000 monthly minimum legal wages. In addition, the antitrust authorities may punish the management of the companies, its statutory auditors and any other advisor or individual executing documents or authorizing the relevant transaction by imposing on them fines equivalent to 300 minimum monthly legal wages.

Offshore Financing and Security Interests

Terms and conditions of loans

As a general rule the terms of loans are freely negotiable and subject to registration (not approval). There are no restrictions on Colombian companies granting loans to other Colombian companies, including their subsidiaries or parent companies. However, only financial institutions (i.e. institutions recognized as such by the banking authorities of their jurisdictions) can make offshore loans to Colombian residents. Colombian companies may make loans to foreign companies provided the funds are conducted through authorized Colombian financial entities.

Types of security

Colombian law contemplates various types of security interests. Under current laws and practices, the main types of securities are the mortgage, the pledge, and the guarantee trust.

Mortgage

The mortgage is a security granted over real estate or over aircraft or certain types of ships, whereby the owner establishes a lien as security for the performance of an obligation, such asset remaining under the property and in the possession of the grantor. The mortgage must be granted by the owner of the pertinent asset by means of a public deed granted at a notary public's office, and for purposes of being effective, it must be registered with the Public Instrument Registration Office of the jurisdiction where the property is located (in the case of real estate). Liens over aircraft must be registered with the National Aeronautic Registry kept by the Civil Aviation Authority and those relating to ships before the Maritime Authority with jurisdiction in the port where the ship is registered. A mortgage allows the creditor to enforce it whoever the registered owner of the asset is at the time of enforcement.

Pledge

The pledge is a security interest established over personal property (either tangible or intangible) securing the performance of certain obligations. The pledge must be granted by the owner of the pertinent asset, and may take one of the following forms, as provided by the Colombian Commercial Code:

Pledge with possession of the creditor

This is a type of pledge where the owner of the personal property delivers the pledged asset to the creditor, who holds it until the guaranteed obligation is paid. This pledge does not require registration and is considered to be valid and effective as from the date on which the given asset is delivered to the creditor, in pledge.

Pledge without possession of the creditor

The Colombian Commercial Code defines this type of pledge as the security interest over personal property involved in, or that is the result of, economic exploitation, where the grantor of the pledge maintains possession of the pledged asset. A pledge without possession of the creditor may be granted by means of a private document, but for purposes of being effective vis-à-vis third parties, the pledge must be registered in the Chamber of Commerce with jurisdiction in the place where the pledged assets are located. In the case of a pledge without possession over vehicles the pledge must be registered with the Transit Authority in the municipality in which such vehicle is registered. The debtor is not authorized to change the location of the personal property being pledged without approval from the creditor. If the creditor authorizes that the pledge be moved to a different location, the pledge agreement would have to be registered in the Chamber of Commerce having jurisdiction over the new location.

Floating mortgages and pledges

Mortgages and pledges may be granted to secure a specific obligation (which obligation must be fully described in the document containing the mortgage or pledge) or to secure present and future obligations of a debtor (securities with dragnet clauses). If a mortgage is granted without specifying the maximum amount secured by the mortgage, it shall be understood that the amount secured by the mortgage does not exceed twice the amount of the obligation. In the case of pledges, the maximum amount covered by the pledge must be included in the pledge document.

When the pledge is granted over a commercial establishment and the pledge includes inventories, accounts receivable and the like, it shall be understood that the goods sold or otherwise transferred, are replaced by others acquired in the normal course of the operations of the commercial establishment. This pledge must be registered before the Chamber of Commerce with jurisdiction over the place where the pledged assets are located.

Guarantee trust

Under this type of guarantee, the owner of the assets to be delivered as collateral (be it the debtor or a third party) transfers such assets in trust to a trust company, with the obligation for the trust

company to manage such collateral for the benefit of the parties mentioned in the given agreement (e.g., debtor and creditors), being able to sell or otherwise dispose of the assets held in trust in case of default under the obligations being secured. The owner of the assets delivered in trust may or may not keep possession of them. This type of guarantee is much more flexible in terms of documentation and stipulations than the mortgage or pledge, but it is also more expensive. If an event of default occurs and continues, the trust company may, following the instructions provided under the trust agreement, sell the assets in the market, without the need of a judicial proceeding, and pay the creditors mentioned in the trust agreement as beneficiaries of the trust, or otherwise deliver the pledged assets to creditors as payment.

Assets not permitted to be subject to a lien

Assets in public domain (owned by the Republic of Colombia or its political subdivisions own, and which are destined for public use (e.g., bridges, rivers, beaches, streets), and assets out of commerce (i.e. assets the marketability of which has been cancelled or suspended, as in the case of assets that have been subject to injunctions, or immovable assets that pertain to a duly formed family estate) cannot be mortgaged or pledged.

Second degree mortgages and pledges

The owner may pledge an asset already mortgaged or pledged without possession of the creditor, and in such event, the priority of the creditor would be determined by the date of registration of the mortgage or pledge.

Rights of foreigners

Under Colombian foreign investment laws, lenders located outside Colombia do not require any approval in order to receive a security interest over property located in Colombia. Furthermore, no approval would be required under foreign investment laws in Colombia for the enforcement of any security interest. There are certain restrictions for ownership by foreigners of real estate located on the borders of Colombia.

Personal guaranties granted by residents of Colombia to secure payment of obligations under financing in foreign currency must be registered with the Central Bank, and any payments made by the guarantor, honoring the guarantee, must be made though the official foreign exchange market. Other security interests such as mortgages, pledges and guarantee trusts are not subject to any registration with the Central Bank nor are they subject to prior approvals from the point of view of the exchange laws and regulations.

Repayment of principal or interest by the debtor must be made through the official foreign exchange

market. Remittances of any amounts collected in Colombia as a result of the enforcement of any security interest must be also made through the official foreign exchange market.

Taxes on offshore loans

Income tax

The legal principle in Colombia is that interest paid by Colombian residents is considered to be Colombian source income, and thus subject to income and remittance tax withholdings at an overall rate of 39.55%. However, the exception to this rule is that loans obtained by Colombian residents that are engaged in activities defined by the Council for Economic and Social Policy (CONPES) as being of interest for the social and economic development of the country, are not considered to generate Colombian source income and are therefore not subject to income or remittance tax. CONPES has indicated that activities pertaining to the primary, manufacturing and services sectors (which includes commercial activities in general) are all considered to be of interest for the social and economic development of the country. This has meant that practically all foreign loans obtained by Colombian residents are excluded from income and remittance taxes.

Stamp tax

There are no stamp tax or other transaction taxes payable by either the borrower or the lender in respect of any foreign currency loan agreement or any document related thereto (including security interest documents). However, mortgages and pledges without possession of the creditor are subject to the payment of registration fees.

Registration / reporting requirements

As mentioned above, foreign loans are subject to registration with the Central Bank. In addition, any payments in foreign currency originated or made pursuant to the loan documents must be made through the authorized foreign exchange intermediaries, being required to present to them a foreign exchange declaration, the purpose of which is to report to the Central Bank the transactions taking place in connection with the registered loan.

Publicity

Registrations of mortgages and pledges are kept in public records in Colombia, and are discoverable by public search.

As a general rule, a guarantee trust does not require any registration or publicity, and would therefore not be discoverable by public search. However, if the transfer of an asset for purposes of

the trust requires registration (as in the case of real estate), such transfer would be a matter of public record.

Although the recording of foreign loans with the Central Bank is not public, it may be discovered by public search.

Qualifications of lender

Foreign financial institutions making loans to residents in Colombia must establish a representative office in Colombia, should the aggregate of the loans made to residents of Colombia exceed, in a given year, the amount of US$10 million. Such representative office must be registered with the Superintendency of Banks and must comply with periodic requirements. Exceptions apply to this obligation in the following events:

a. When the operations of the foreign finance institution consist of the opening of credit lines to Colombian finance institutions
b. When the foreign finance institution is a subsidiary or affiliate of a financial institution duly authorized to operate in Colombia
c. When the lender participates in syndicated loans and does not act as agent under such syndicated loan
d. If the lender is a multilateral organization, in which Colombia participates

A foreign lender would not be subject to any specific qualifications in order to be able to receive or enforce security assets located in Colombia.

Formalities

As a general rule, the document whereby the security interest is granted must be in Spanish. If the document is executed in a foreign language, an official translation into Spanish, by a translator duly authorized by the Colombian Ministry of Foreign Affairs will be required for purposes of the registration and/or the enforcement of the security.

Mortgages over real estate must be granted by means of a public deed and must be registered before the Public Instruments Registration Office within 90 days from the date of granting. Mortgages over aircrafts and ships must, as a general rule, be granted by a public deed or by a duly authenticated document, which deed or document must be registered before the National Aeronautics Registry or the Maritime Authority, as the case may be. Pledges without possession of creditor may be granted by means of a private document, with the signatures of the parties duly authenticated, and must be registered with the Chamber of Commerce of the jurisdiction where the assets are located (or with the Transit Authority in the corresponding municipality, in the case of vehicles).

The security document must clearly identify the obligation or obligations being secured. In the case of pledges without possession of the creditor, the Commercial Code requires, in order for the pledge to be valid and effective, that the pledge contains at least (a) the name and domicile of the creditor and the debtor; (b) the date, nature and amount of the obligations being secured, including interest thereon; (c) the maturity date; (d) a detailed description of the pledged assets; (e) the location where the pledged assets are to remain, indicating if the owner of the pledged assets is the owner, lessee or tenant of the given premises; (f) if the pledged assets belong to the debtor or to a third party; and (g) the date and the amount of the insurance contracts and the name of the insurance company, if the pledged assets are insured.

Priority and preference for payment

As a general rule, any payment obligation grants the creditor thereof the right to pursue payment over all the debtor's assets, present or future, except for assets legally qualified as non-attachable. Therefore, a creditor is entitled to judicially request and obtain the attachment of debtor's assets and the sale of such assets in a public auction, and use the proceeds of the sale to repay any amounts outstanding, including interest and collection related costs. If the proceeds of the sale are not sufficient to pay all debtor's outstanding obligations, then creditors will be paid in proportion to the amount of their claims.

Notwithstanding the foregoing, certain creditors have priority over others, as follows:

a. First priority is granted to those creditors whose claims are related to: (i) the judicial expenses incurred in for the general interest of creditors; (ii) the costs associated with the illness and funeral expenses of the deceased debtor; (iii) salaries and other compensation payable under employment contracts; (iv) the elements deemed necessary for the subsistence of the debtor and the debtor's family; and (v) tax obligations.

b. Second priority is granted to the beneficiary of a mortgage or pledge over the asset subject to the security interest. Creditors secured by a mortgage or pledge would not be affected by the preference of those creditors having first priority, unless debtor's assets are not sufficient to cover obligations in favor of those creditors with first priority; in such latter case creditors having first priority would prevail over those having second priority.

c. Finally, unsecured obligations with no privilege, have third priority and these obligations are paid with whatever remains of the debtor's assets, in proportion to their respective amounts and irrespective of the date on which the obligation was acquired.

Obligations secured with a guarantee trust are paid with the assets delivered in trust. Creditors not

benefiting from the guarantee trust may only go against the assets delivered in trust, if the given obligation predates the date on which the guarantee trust was created; provided, however, that such creditors demonstrate that pursuant to such guarantee trust, they suffered damages.

A priority by the date of registration will be available in the case of the granting of two they suffered or more mortgages or pledges over the same assets.

Special rules may apply in the event that the debtor enters into a debt restructuring under so-called Law 550 (which is in many ways similar to the US Bankruptcy Code Chapter11).

When debtors are admitted to Law 550 procedures, secured creditors may not exercise their rights under the securities for the duration of the negotiation of the reorganization and, if so provided under the restructuring agreement, for the duration of the business reorganization scheme. In addition, other creditors or the debtor may demand the reduction of the security interest up to an amount equal to one and a half times the outstanding credit.

Choice of law and forum

Obligations to be performed abroad under foreign loans may be governed by the applicable foreign law. With respect to obligations to be performed in Colombia, a discussion exists as to whether the general provision according to which obligations to be performed in Colombia must be governed by the laws of Colombia is (a) a public policy provision (in which case such obligations must be governed by the laws of Colombian in all cases); or (b) a conflict of law provision, in which case obligations in Colombia may, with certain exceptions, be governed by foreign law.

Security interests over assets located in Colombia would have to be governed by the laws of Colombia. Security interests over assets located abroad, even though owned by Colombians, may be governed by the applicable foreign law.

Submission to the jurisdiction of a foreign court would be valid and enforceable, provided that there is a foreign element in the given contract or security (e.g., a foreign creditor; assets located abroad; obligations to be performed abroad). The decision obtained in a foreign court may be enforced in Colombia as discussed in section 0.

Remedies and enforcement

Under Colombian law a creditor may not directly dispose of the mortgaged or pledged asset, and any stipulation to that effect would be null and void. Consequently, a judicial proceeding is required for the enforcement of a mortgage or a pledge.

If the security document incorporates the obligation being secured, at maturity the creditor may enforce the security without the need of submitting to the court a document evidencing the obligation. However, if, as is usual, the obligation being secured is not incorporated in the document containing the security but in a separate document (e.g., a loan agreement or a negotiable instrument), then, in order to enforce the security, the creditor would have to submit to the court, together with the public deed containing the mortgage or the pledge agreement, a document evidencing the obligation being secured by the given mortgage or pledge.

Assuming that the document incorporating the secured obligation originates from the debtor and contains a clear, express and due obligation in favor of the creditor, then the creditor may request and obtain, as injunctive relief, the attachment of the mortgaged or pledged asset even before the debtor is actually served process. The assets so attached shall be sold in a public auction in which the creditor (a) may participate and make an offer to acquire the asset in exchange for the given credit, or (b) decide not to participate but rather to receive the proceeds of the sale.

In the case of guarantee trusts, no judicial proceeding would be required, and the creditor would be paid, or may take possession of the given asset, once the proceedings for enforcing the guarantee, as provided for in the trust agreement, are followed by the trust company. In the case of bankruptcy or Law 550 proceedings, creditors' rights under guarantee trusts may not be enforceable.

Dealer Legislation

Engaging distributors or commercial agents in Colombia may be a good way of doing business for foreign entities wishing to participate in the market without a legal presence. However, the Colombian Commercial Code provides special protection for local commercial agents against termination of their agency.

Definition of commercial agent

The Colombian Commercial Code defines a commercial agent as any merchant who promotes sales "as the representative or agent of a local or foreign principal, or as the manufacturer or distributor of one or more products of the same."

The Colombian Supreme Court has interpreted this definition narrowly to exclude from the scope of application of dealer protection regulations, all merchants who acquire title to products that they purchase, and then resell such products for their own account. Therefore, although the dealer legislation applies to agents, who work on a commission basis, it does not appear to protect buy-sell distributors.

Nevertheless, because the decisions of the Colombian Supreme Court are not binding precedents, it is unclear to what extent the Colombian courts will follow these previous decisions in future cases. Existing decisions indicate that Colombian courts will apply dealer legislation more readily to commission agents than to buy-sell distributors.

A few arbitration tribunals have adopted opinions that differ from that of the Supreme Court and have held that the existence of a buy-sell distribution should not prevent any agreement from being a commercial agency agreement, if the essential elements of a commercial agency are present in other words, independence and stability of the dealer and the performance of promotional activities for the benefit of the principal. This opinion however, is not generally accepted, and the majority of arbitration tribunals tend to follow the precedent established by the Supreme Court.

Commercial agency agreement

The Commercial Code requires that a written commercial agency agreement is registered at the appropriate Commercial Registry in Colombia. Failure to comply with the registration requirements will simply prevent the enforcement of the agreement vis-à-vis third parties, but will not the affect the enforceability of the agreement between the parties. The Commercial Code also acknowledges

the existence of *de facto* or unwritten commercial agency agreements. Therefore registration is not a prerequisite for a commercial agent to seek protection from dealer legislation.

Contents of the commercial agency agreement

A commercial agency agreement must specify the activities, powers and authority of the dealer, and the specific territory in which the dealer may operate.

Exclusivity

The principal may appoint only one dealer in a specified geographical area for the same products or type of activity, unless otherwise provided in the commercial agency agreement.

Therefore, if the commercial agency agreement does not specifically contemplate a non-exclusive appointment, the appointment will be deemed to be exclusive.

Non compete covenants

A commercial agency agreement may restrict the dealer from promoting or operating, within its territory, any business that competes with the business of the principal. In the absence of such a restriction, the dealer may promote competitive products.

Notwithstanding the above, when drafting a covenant not to compete it is important not to breach any antitrust or consumer protection rules.

Accrual of commission or compensation to the dealer

The Commercial Code establishes that the dealer is entitled to a commission or compensation for all sales made within its territory and for any transaction that is not completed by fault of the principal. Thus, the commercial agent will be entitled to commission or compensation when the principal sells products directly to customers within the territory.

It is unclear whether the aforementioned rule applies to commercial agency agreements that specifically contemplate a non-exclusive appointment. However, strictly based upon the language of the relevant statutory provisions and apparent commercial practice, the rule should apply to exclusive commercial agency agreements in all cases, and to non-exclusive commercial agency agreements whenever the commercial agent could have completed the relevant transaction had it not been for the acts of principal.

Termination benefits

Severance payment

Pursuant to the Commercial Code, a principal will be required to make a severance payment upon termination of the commercial agency agreement, regardless of the reasons for termination.

The amount of this payment must equal one-twelfth (1/12th) of the average annual commission or profit received by the commercial agent over the last three (3) years, multiplied by the number of years during which the agreement was in effect. If the agreement was in effect for less than three (3) years, the average is calculated on all commissions and profits it received in connection with the commercial agency agreement.

Equitable termination indemnity

An "equitable" termination indemnity is payable by the principal if (i) the principal terminates the commercial agency agreement without "just cause," or (ii) the commercial agent terminates the commercial agency agreement with "just cause."

The equitable indemnity is intended to compensate the commercial agent for developing a market for the principal's products. The amount of the equitable indemnity is determined by experts on the basis of the duration, volume and importance of local sales promoted by the commercial agent under the commercial agency agreement.

Possibility of waiving termination benefits

Currently, there is an important debate as to whether a commercial agent may waive the severance payment by prior agreement. The Supreme Court position is that a commercial agent may waive its rights to the severance payment only after the right has vested (i.e., on termination of the commercial agency agreement).

However, a subsequent arbitration tribunal held that the severance payment could be waived on execution of the commercial agency agreement. This opinion has not been followed by either the Supreme Court or by any other arbitration tribunals to date.

Therefore Colombian courts and arbitration tribunals are not likely to enforce any advance waiver of the severance payment.

It is even less likely that a commercial agent can waive the equitable termination indemnity by prior agreement. Unlike the severance payment, the termination indemnity is payable only when the

principal commits an unjustifiable act (i.e., terminates the commercial agency agreement without "just cause" or gives the commercial agent "just cause" for termination).

By waiving the termination indemnity in advance, the commercial agent in effect consents to the unjustifiable act before it has been committed. Such waivers are void under Article 1522 of the Colombian Civil Code, which prohibits any person from agreeing to condone future willful misconduct.

Choice of law

Under the Commercial Code, a commercial agency agreement to be performed within Colombia is subject to Colombian law. Any provision to the contrary will be deemed to be null and void.

Although still subject to debate, many consider this provision to be a Colombian conflicts of laws rule, meaning it would not necessarily apply in the event of a dispute if the contract validly submits such disputes to international arbitration (the existence of a non-Colombian party, for example, would validate the agreement to submit any dispute to international arbitration).

In such an event the proper law of the contract would have to be determined according to the conflicts of laws rules of the forum chosen by the parties.

Statute of limitations

The statute of limitations for actions deriving from a commercial agency agreement expires in five years.

Tax Regime

Income taxes

Colombian source income

As a general rule, income derived from services rendered inside Colombia, or from the transfer of any kind of assets that are located inside the country at the time the transfer takes place, or from the exploitation of assets located inside the country, is deemed to be income of a national source. On the contrary, income derived from services rendered outside the country, or from the transfer of any kind of assets that are located outside the country at the time the transfer takes place, or from the exploitation of assets located outside the country, constitutes income of a foreign source. Although interest paid on foreign loans is treated as foreign source income as well, the exception to this rule is so broad that practically all legitimate foreign loans qualify for tax free treatment.

As a general rule, foreign investors are taxed on Colombian-source income only, but the base on which the tax is paid varies depending on whether or not the investor has established a business presence (a branch office or a Colombian affiliate) in Colombia.

Taxable income

Corporate entities are required to pay income taxes based on net income ("taxable income"), which is defined as the sum of all operating receipts plus non-operating income, minus the cost of goods sold or cost of services, minus the general business expenses incurred in the business during the year.

However, a corporate taxpayer may be required to pay the income tax based on the so-called "presumptive income", which is an alternate minimum taxable income, whenever same exceeds regular net income in any given year. Presumptive income is equal to 6% of net worth as of December 31 of the preceding tax year (the tax year is the same calendar year in Colombia).

"Net worth" is assets minus liabilities as reported on the income tax return. Taxpayers are required to report assets and liabilities on their returns for several purposes, two of which are: (i) to compute presumptive income and (ii) to provide means for the Tax Office to check the level of taxable income as it relates to increases in equity.

Income tax rates

The general corporate income tax rate (applicable, among others, to branches of foreign entities) is 35%. However, with the purpose of increasing the tax collections, a recent tax reform increased the

rates for years 2004, 2005 and 2006 by means of a surcharge of 10% over the current 35% tax rate for 2003, which results in an aggregate income tax rate of 38.5%. This surcharge would only be applicable in connection with taxpayers who file income tax returns in Colombia. Furthermore, this surcharge would not be deductible or creditable against the income tax liability.

Remittance tax

In addition to income tax, foreign investors are required to pay a "remittance tax" upon the remittance of Colombian-source profits outside the country. In essence, this tax is a surcharge on income tax.

Branches of foreign companies are subject to remittance tax on book profits at the rate of 7%. In the case of affiliates of foreign companies incorporated in Colombia (limited liability companies or corporations), the remittance tax is paid in the form of a foreign-shareholder income tax on profit/dividend distributions at the same rate of 7%. In either case (branches or affiliates), the foreign investor is exempted from paying this "remittance" surtax if it reinvests the profits/dividends in Colombia for at least five years.

Inflation adjustments

In 1992, with the purpose of unlinking the impact of inflation on the assessment of tax basis, the Government enacted a set of rules for inflationary adjustments. The general purpose of inflation adjustments is to recognize the effects of inflation on the financial statements and on the tax burden of taxpayers. As a general rule, save for some exemptions, the taxpayers that must keep accounting records are required to adjust non-monetary items by inflation.

Thus, as from 1992 corporate taxpayers are required to adjust their book and tax items for inflation. Specifically, inflation adjustments apply to non-monetary assets, non-monetary liabilities, and tax equity (net assets). Any excess of the adjustment of non-monetary assets over the other two adjustments is reflected in taxable income, and any defect of the adjustment of non-monetary assets in respect of the other two adjustments may be deducted from gross income. Depreciation, amortization, and inventory usage is based on adjusted costs.

In practical terms, this system of integral adjustments has not accomplished its initial purpose of preventing inflation from affecting taxation, and, depending on the behavior of inflation and devaluation indexes, serious distortions occur.

Nevertheless, depending on the specific situation different alternatives have been developed to deal with these distortions in the context of law.

Transfer pricing

Colombia started the application of transfer pricing rules as from January 1, 2004. The new regime adopts the OECD model (which is the same as in Mexico). This will basically obligate taxpayers who perform business activities with related parties, to determine their income based on a profit margin comparable to the one obtained in deals with unrelated parties. In addition, the taxpayers will be obligated to keep for five years all records of operations or transactions involving related parties, and will be obligated to report to the tax authorities annually all operations and transactions performed with related parties.

In principle, the methods set forth for the determination of the profit margin, are (i) the Comparable Uncontrolled Price Method (CUP); (ii) the Resale Price Method; (iii) the Cost Plus Method; and (iv) the Profit Split Method.

There are currently some limitations in the law, regarding deductibility of expenses that are incurred with related parties (i.e. interest paid to related parties, losses or capital losses on the sale of assets to related parties, etc). In principle, these limitations would not be applicable to the taxpayers that comply with the transfer pricing requirements referred to above.

In addition, taxpayers are entitled to enter into Advance Pricing Agreements ("APA") with the Tax Authorities during 2003.

Branches v. subsidiaries

Branches and subsidiaries are subject to the general rules explained above and to the specific rules that follow. There are, however, two main differences in the tax treatment that may apply to them.

The overall tax burden on income that is free of corporate income tax in Colombia and is distributed outside Colombia is different. In the case of a subsidiary, the foreign shareholder(s) is(are) required to pay a 39.55% tax on dividends distributed out of earnings not taxed at the corporate level (this tax comprises the 35% income tax, plus the 7% foreign shareholder tax which is applied on the dividend after deduction of the 35% tax). On the contrary, a branch of a foreign company will only pay 7% upon the remittance of profits that were not subject to the 35% corporate income tax.

Income derived from the sale to foreign markets of products manufactured by a branch in a free zone is exempt from income tax and remittance tax. This exemption applies to services rendered by a branch to foreign clients from a free zone. In the case of a subsidiary, however, the same type of income (derived from exports of manufactured products or services from a free zone) would be exempt in the hands of the subsidiary, but it would be taxed at the full 39.55% rate when paid out as dividends to the foreign shareholders as explained above.

Some specific rules

Technical assistance and technical services rendered abroad

Fees paid for technical assistance or technical or consulting services rendered abroad are subject to a flat 10% withholding tax and are fully deductible for the payer, provided the applicable withholdings are made. Technical assistance or technical services always involve labor or work on the part of the service provider (actual training or design work or hands-on service), as opposed to the simple fact of making patent applications, know-how, formulae, etc., available to a third party under a license.

Overhead and royalties

Management overhead expenses, royalties, and other amounts charged for the acquisition or exploitation of intangible assets that are paid to (or credited in the account of) the parent company or a related "foreign office" may be deducted for income tax purposes in Colombia, provided that the (corresponding) withholding taxes are paid (see below).

While this withholding requirement clearly applies in the case of royalties and other payments for the use of intangible assets (and so the scope of the rule is clear here), it is unclear whether it applies to management overhead expenses too, as this type of expense (which normally involves administrative functions performed outside Colombia) is not subject to withholding tax as a rule.

15% ceiling

Direct operating costs and general business expenses incurred abroad other than those noted below, for obtaining national source income, are deductible provided they do not exceed 15% of taxable income as computed before deducting said costs and expenses. The following items are not subject to the 15% ceiling:

a. those which are subject to withholding tax;
b. commissions paid to foreign agents on the procurement and/or sale of merchandise, raw materials and other assets;
c. interest paid on foreign credit/loans (import/export credit included);
d. repairs and maintenance of equipment;
e. training of personnel of state-owned companies;

f. lease payments made under cross-border financial leases;
g. the cost of any tangible assets;
h. those which are capitalized for future amortization under generally accepted accounting principles;
i. those incurred pursuant to a specific legal requirement (as opposed to a contract requirement).

Deductible/creditable taxes

80% of the industry and commerce tax and 80% of the tax over real estate are deductible for income tax purposes, as long as the same have a direct relation with the taxpayer's income.

Financial leases

Lease payments on cross-border financial leases are not subject to withholding tax in Colombia provided that the leases meet certain conditions, e.g. that they are related to projects that foster the development of the country and that payments thereunder are made through the exchange market (i.e. through any of the local banks).

For financial leases executed on or after January 1, 1996, lease payments are deductible as they are incurred by the lessee only when the lease term is equal to or greater than 60 months for real property (except land), 36 months for machinery and equipment, and 24 months for vehicles and computers. If any of these conditions are missing, then the lessee is required to carry the leased asset on its books and depreciate/amortize it over the normal useful life of same, and at the same time deduct the financial cost of the lease as incurred each year (Tax Code, articles 25, 127-1).

Borrowing

Interest paid under foreign loans is not subject to withholding tax in Colombia provided that the leases meet certain conditions, e.g. that they are related to projects that foster the development of the country and that payments thereunder are made through the exchange market (i.e. through any of the local banks or registered offshore accounts).

The cost of foreign borrowing from unrelated parties is deductible provided that the loans meet certain conditions, e.g. that they meet the conditions for not being subject to withholding tax, or that the relevant withholdings are performed.

Debt equity ratio / thin capitalization rules

Colombia lacks a set of "thin capitalization" rules. However, there is a provision that may be interpreted as a thin capitalization provision, as it provides that the debts that Colombian agencies, branches and subsidiaries have in favor of their home offices or parent companies domiciled outside Colombia, will be deemed for tax purposes, as net worth of the Colombian agencies, branches or subsidiaries, and not as a debt. Consequently, interest and financial charges including exchange losses paid by Colombian branches, affiliates or subsidiaries to their foreign home offices, parent companies, or related entities are not deductible for income tax purposes in Colombia.

The above means that local companies may not use for tax purposes the debt with their home offices or parent companies, as a factor to reduce their net worth, which will eventually have an impact on the inflation adjustments of the net worth, and in the determination of the so-called "presumptive income", in order to determine its final income tax liability.

Mergers of companies with tax loss carry forwards (NOLs)

In principle, entities that merge become one entity, thus mixing their NOLs. However, the trend in Colombia has been of constantly limiting the possibility to transfer said NOLs to a merged party. Furthermore, the limitations also cover the spin-off of companies or corporations.

Under current rules the absorbing company or the spun-off company, may offset NOLs against ordinary net income (not all the income) of the absorbed company or the other spun-off company respectively, up to a limit equivalent to the participation in the net equity (i) of the absorbed company in the absorbing company; or (ii) of the spun-off companies with respect to each other. In both cases, the offsetting of NOLs must take into consideration the fiscal periods of the NOLs and the annual limitations in effect for each of the years in which the NOLs are generated and declared.

As an additional limitation, the offsetting of NOLs in the above cases (i.e. for mergers and spin-offs) would only be viable if the economic or income generating activity of the companies involved in such processes is the same, and is maintained after the respective process. In both cases, when the taxpayer uses accumulated tax losses in determining its ordinary taxable income, the tax authorities will have a five-year period to audit the income tax return for that particular fiscal year.

Furthermore, the current regulations state that losses derived from non-taxable income or from expenses that do not have a cause-effect relation with the income generating activity, may not be offset against the ordinary net income of the taxpayer.

Withholding taxes

As a means to collect income taxes in advance, the law has established a system of tax withholdings that requires every person making payments to a taxpayer to withhold a certain percentage depending on the concept being paid. For those who must file an income tax return, all amounts withheld are a prepayment of the final tax liability and as such are credited on their return.

Nonresident foreign companies are taxed on Colombian source income only, by means of withholding taxes that vary depending on the type of income being paid. The most common are the following:

Royalties

Royalties paid or accrued to foreign nonresident licensors (other than "royalties" paid under software licenses and film licenses) are subject to withholding taxes in Colombia in the amount 39.55%.

Technical assistance, technical services and consulting services

Technical assistance, technical services and consulting services rendered either inside the country or abroad by nonresident companies are subject to a flat withholding tax of 10%.

Software licensing

Compensation paid to foreign nonresident licensors for software licenses is subject to withholding taxes in Colombia in the amount of 32.032%. This tax comprises a 35% income tax of 80% of the compensation (i.e. 28%), plus a 7% remittance tax of 80% of the net compensation paid (i.e. after the income tax withholding) (amounting to 4%).

Film licensing

Compensation paid to foreign nonresident licensors for film licenses (or film distribution) is subject to withholding taxes in Colombia in the amount of 24.318%. This tax comprises a 35% income tax

of 60% of the compensation (i.e. 21%), plus a 7% remittance tax of 60% of the net compensation paid (i.e. after the income tax withholding) amounting to 3.32%.

Tax havens

Payments (regarding interests, commissions, royalties among others) that are Colombian source income and are transferred to parties either resident/domiciled, or that have their business operations in tax havens are subject to withholdings at a rate of 35% for income tax, plus 7% for remittance tax (on an after income tax basis), for an effective combined rate of 39.55%.[2]

Personal income taxes

Compensation paid for personal services rendered inside the country is locally sourced income and as such is subject to withholding taxes. As a rule, 25% of employment compensation limited monthly to an amount of Col $4,000,000, is tax exempt. Other exemptions apply (e.g. contributions to retirement accounts; pensions up to a certain level, etc.). Practically, the only deductions available for employees are mortgage interest, or health and education expenses.

Employees are required to file a personal income tax return when their annual employment income exceeds a certain ceiling (Col$ 60,000,000 for tax year 2004), or whenever the patrimony/equity on the last day of the fiscal year exceeds Col$80.000.000, in which case the total annual withholdings may be credited against the final liability. For residents (i.e. those individuals who stay six months or more in Colombia during the year, as a rule), the income tax rates vary depending on the level of income.

For nonresidents (i.e. those individuals who stay less than six months in Colombia during the year, as a rule) the income tax rate applicable on their Colombian-source income is always 35%.

In addition to income tax, individuals are also required to pay a "remittance tax" upon the remittance of Colombian-source income outside the country, at the rate of 7%.

Tax Haven

[2] When these payments have been subject to tax withholdings, then they may be deductible for the local party making the payment. If the payments do not constitute Colombian taxable income, then they would not be subject to the referred withholdings, and they would not be deductible for the party making the payment.

The recent Tax Reform (Law 863 of 2003) states that it will be presumed that business operations entered into between Colombian residents or domiciled parties, on the one hand, and residents or domiciled parties in low tax jurisdictions, on the other hand, will be deemed to be made between related parties, and thus, subject to the transfer pricing regulations (regardless of their amounts of equity or gross income).

The government must determine the list of the low tax jurisdictions, based on the compliance with the fist and any other of the following criteria:

1. Nonexistence of taxes or with lower tax rates than those applicable in Colombia for similar operations;

2. Lack of exchange of tax information, or the existence of dispositions limiting the same;

3. Lack of transparency with respect to regulations or administrative managements;

4. Absence of the requirement of the development of a real activity within the country.

The Colombian government can use as a reference the international accepted criteria with respect to low tax jurisdictions. In addition, some countries can be excluded from the list based on external political relations issues.

Value Added Tax (VAT)

VAT (or IVA in Spanish) is levied on the importation of goods into the country, and on the sale of goods and the rendering of services inside the country. Certain goods (raw food, vegetable products, some medicines, oil, gas, electricity, and others) and services (health care, transportation, and others) are excluded from VAT. The general rate is 16%, but there are certain goods and services subject to different rates (i.e. 7% for non exempt medicines, agricultural related machinery etc, 20% rate for mobile telephony, etc.)

As the tax is designed to cover the added value of goods and services in circulation, it is the end user who normally pays the cost of the tax. While those who sell goods and render services are legally accountable for VAT, they act as tax collectors and set off the VAT they pay on raw materials, supplies and merchandise with the VAT they collect from customers, and pay the excess of the latter over the former to the government.

VAT taxpayers are required to register as VAT vendors with the Tax Office, disclose the VAT they

charge on their invoices, carry a general ledger account for entries related to the tax called "*Impuesto a las Ventas por Pagar*" (VAT payable), and file bi-monthly returns reporting the VAT charged to customers and the VAT paid to suppliers or paid on imports.

All services rendered inside the country by nonresident companies are subject to VAT withholding (to be performed by the local customers) at the general rate, unless the particular service being rendered is excluded from VAT by law.

Industry and commerce tax

This is a municipal tax. It applies to industrial and commercial activity, as well as to services rendered within a municipality, on gross income except for exports, proceeds from the sale of fixed assets, refunds, subsidies and withholdings. Municipal treasurers and finance secretaries are the authorities responsible for collecting and managing the tax. The rate is set by each municipality, according to the following limits, which are established by law: (i) industrial activity is taxed at rates between 0.2% and 0.7% and (ii) commercial and services activity is taxed at rates between 0.2% and 1.0%.

Stamp taxes

Stamp tax is levied on written documents, securities included, executed in Colombia or abroad, but with effects inside Colombia, whereby obligations are created, modified, assigned, extended or terminated, whenever their value exceeds Col.$56,684,000 (value in force for the year 2004), at a rate of 1.5% of the value of the obligations embodied in the corresponding document.

If a document does not have a determined amount, stamp tax accrues on every payment that is made under the relevant contract, during the time in which such contract is in force. It is understood that a document does not have a determined amount when its value cannot be determined at the moment of its execution.

Specific exemptions exist for documents embodying obligations related to foreign indebtedness, exports, and the sale of shares, among others.

Customs duties and taxes

General rules

Merchandise imported to Colombia is generally subject to customs duties upon its importation. Likewise, the appraisal of the goods required to determine the applicable taxes and duties is done in

accordance with international valuation rules, and thus the preferred method of valuation is that of the "transaction value" of the imported goods. (i.e. the price that is effectively payable for the merchandise when it is sold for exportation to the importer country).

The duties are calculated on the customs value of the goods to the port of entry in Colombia.

Goods imported into Colombia are classified for customs purposes in accordance with the Colombian Tariff Schedule, also based on the Harmonized Commodity Description and Coding System.

Goods brought into Colombia by courier shipments do not require import registration, if the imported goods are not for commercial purposes, are worth less than USD $1.000.oo, have a weight not exceeding 20 pounds; and have a size not exceeding either 1.5 meters in any of its dimensions or 3 meters when adding its length and the greatest of the other dimensions.

Import VAT

Import VAT is payable upon importation of goods to Colombia at a rate of 16% (or other applicable rate) over the dutiable value of the merchandise (customs value plus duty).

The importation of industrial machinery would not attract VAT, provided that no local production of comparable equipment exists, and the importation is performed by the so-called "*usuarios altamente exportadores*" (users deemed as frequent exporters). Furthermore, the importation of goods in furtherance of international cooperation treaties, and the importation of machinery and equipment with certain environmental qualification, would be VAT exempt, as would heavy machinery and certain other goods.

Financial operations tax

The financial operations tax was established for the purpose of collecting funds for a geographical area that was affected by an earthquake in early 1999. Although the financial operations tax was meant to be transitory, it was established as a permanent tax in late 2000.

The taxable event is the performance of financial operations whereby individuals or legal entities use funds that are deposited in current or savings accounts, as well as the issuance of certified checks, except for (inter alia) certain transactions performed between accounts of the same holder. The tax is levied at a rate of 0.3%, nevertheless for years 2004 through 2007 the rate would be of 0.4%, and must be withheld by the financial entities through which the operations are performed.

The financial operations tax is not deductible for income tax purposes.

The Employment Regime

Employment contract

An employment contract is one by which any individual (employee) agrees to render a personal service to another person or entity (employer), under the continued subordination of the latter, for a remuneration (salary).

An employment contract shall be deemed to exist regardless of the name given to the relationship, when the following three elements are present: (1) the personal activity of the employee; (2) the subordination of the employee, which allows the employer to demand from the employee compliance with orders at any time, with respect to the manner, time or quantity of the work to be performed, and to impose rules in connection therewith; and (3) the payment of remuneration.

Depending on how the parties stipulate the duration of the employment contract, the contract can be:

a. For the duration of a specific job: This is when the employment contract is entered into for the period required to carry out certain work or employment, which must be expressly determined.

b. For a fixed period: This is when the employment contract is entered into for a fixed term of duration. This kind of contract must necessarily be executed in writing for purposes of the validity of this stipulation. The initial term of duration for these kind of contracts can not exceed three years, but it may be renewed indefinitely.

In the case of a fixed period employment contract the initial term of which exceeds 30 days, if none of the parties notifies the other in writing of the decision not to extend the contract, at least 30 days before the expiration of the stipulated term, it is understood to have been renewed for an additional similar period, and so on successively, provided however, that if the initial term of duration is less than one year, it can be renewed for equivalent periods only three times; thereafter, the renewals can not be for less than one year periods.

c. For an indefinite term of duration: A employment contract for an indefinite period is one not stipulated for a fixed period or whose duration is not determined by the work or nature of the labor contracted.

Salary

In principle, any payment that qualifies as being salary must be taken into account when calculating the employment benefits payable to employees.

The notion of salary in Colombia is quite broad, as the law sets forth a general principle with certain illustrative examples, but the provision is basically a catchall.

Salary is defined as not only the ordinary remuneration, fixed or variable, but also everything the worker receives in money or in kind, as direct compensation for his/her services, regardless of the form or name given thereto. By way of illustration, and subject to point a, b, c and d of this section below, the following elements constitute salary: (i) premiums; (ii) extra pay; (ii) habitual bonuses; (iv) overtime pay for work on compulsory days of rest; (v) surcharge work; (vi) percentage on sales; (vii) commissions; (viii) meals; (ix) housing; (x) clothing and (xi) permanent travel expenses ("*viáticos*"), in that part corresponding to meals and maintenance.

The following elements are expressly excluded from salary by law:

a. sums that the employee receives occasionally and as an act of mere liberality of the employer, such as occasional premiums, bonuses and gratuities;

b. sums received in money or in kind not for the benefit of the employee nor to provide for his necessities or to enrich his patrimony, but to properly discharge his functions, such as: (i) representation expenses; (ii) means of transportation; (iii) work implements and (iv) travel expenses ("*viáticos*");

c. social benefits that are mandatory by law;

d. Some habitual or occasional extralegal benefits, paid in money or in kind, when the parties have expressly agreed in writing that they are not a constituent part of salary.

Legal rules for the establishment of salary levels

There is no legal provision establishing special salary levels, except for the minimum wage. The current minimum wage is Col.Ps$358.000 per month plus a transportation allowance of Col.Ps$41.600 (which by law should be considered for the calculation of some social benefits).

In practice, and subject to the minimum wage, salary levels depend on the criterion of the employer, the quality of the employee and, in general terms, on the specific characteristics of the activity (such as the average salary levels applicable in the region for like services).

The monthly salary normally remunerates the employee for his services rendered during the ordinary work day, which is any time between 6 a.m. to 10 p.m. The legal maximum duration of the ordinary working week is forty-eight hours per week. Exceptionally, overtime work is permitted in some instances, but must be paid with a surcharge as follows:

a. Night work (i.e., work performed between 10:01 p.m. and 6 a.m.) must be paid at 35% over and above the remuneration paid for day work (i.e., work performed between 6:01 a.m. and 6 p.m.).

b. Overtime day work is paid at 25% over and above the remuneration of the ordinary day work.

c. Overtime night work is paid at 75% over and above the value of the ordinary day work.

d. Work performed on Sundays or legal holidays is paid at 75% over and above the salary for ordinary day work. In addition, the employee who, as an exception, works on Sunday or a legal holiday, has the right to a compensatory day of rest, with pay, or to monetary compensation, at his option. Employees who work habitually on Sundays or legal holidays must receive a compensatory day of rest, with pay, without prejudice to the aforementioned monetary compensation.

Those who discharge functions involving management, trust or handling of funds or property, those who perform discontinuous or intermittent activities, and those who perform services of simple surveillance when they reside on the work premises are excluded from the rules related to the legal maximum work day. Thus, these employees are not entitled to a surcharge when they perform overtime work.

Integral salary

It is possible to agree in some cases that an employee's salary not only remunerates ordinary services, but also compensates in advance some social benefits, allowances, surcharges for work on Sundays and holidays, incidence of permanent traveling expenses and in general, whatever payment or benefit in money or kind expressly identified in the agreement as included in the integral salary payment, which the employee would otherwise receive separately, save for vacations and the affiliation to the Integral Social Security System. This form of salary is called "integral salary".

The monthly integral salary must be agreed in writing and can in no event be less than an equivalent to ten monthly minimum legal wages increased by 30%, and therefore is aimed at mid-level and senior-level employees.

Social benefits

Colombian employment laws require the employer to pay to the employee a number of mandatory benefits, called social or fringe benefits, which are the minimum payable to employees that do not have an integral salary arrangement.

Severance pay (*cesantía*) and interest on severance pay

Employees hired prior to 1991

Employees hired prior to January 1, 1991 and that have not expressly agreed to apply the legal regime that came into effect on January 1, 1991, are entitled to severance pay at the end of the employment relationship equivalent to one month of salary for each year of services, and proportionally for fractions of a year (less any partial payments of severance pay that may have validly occurred during the course of the employment). The salary basis for the calculation of this severance pay is the latest monthly salary of the employee if such salary is a fixed salary and has not been modified during the three months prior to termination. If the salary, being a fixed salary, was modified during the three months prior to termination, the salary basis for calculating this severance pay is the average monthly salary corresponding to the last year of service.

This severance pay generates interest payable yearly by the employer at the rate of 12% per annum calculated on the accrued severance existing on December 31 or at the date of termination, on the date of partial payments of severance pay when such partial payment occurs during the course of the employment, in proportion to the time worked during the calendar year in which termination or partial payment of severance pay takes place. The interest of the preceding calendar year must be paid directly to the employee during the month of January of each calendar year.

Employees hired on or after January 1, 1991

Employees hired on or after January 1, 1991 or that are not otherwise subject to the legal regime than came into effect on this date, are entitled to a severance pay that is calculated yearly and deposited by the employer into an account designated by the employee with a "severance fund" (i.e. financial entity authorized by the Government to receive and administer such funds), no later than February 14 of each year. This deposit constitutes final payment of the severance pay through December 31 of each year, and thus, the calculation of the deposit that must be effected for each year should take into account only the time worked by the employee during the corresponding calendar year. Additionally, the employer must make payment of the 12% per annum interest discussed above directly to the employee.

Upon termination, the employee is entitled to draw amounts from his/her account at the severance fund, and is entitled to receive directly from the employer the severance pay accrued from January 1 through the date of termination, plus the interest thereon must be paid by the employer directly to the employee. Employees are entitled to the payment of partial payments, in the events and with the procedures established in the law by way of limitation.

Semester bonus

This benefit is equivalent to 15 days salary payable to the employee the last day of June of each year, and 15 days salary payable to the employee within the first 20 days of December of each year, both payable in proportion to the time worked during the respective calendar semester This benefit is due upon termination, in proportion to the time worked during the calendar semester in which termination takes place provided that the employee is not discharged for a proven just cause.

Affiliation to the integral social security system

Irrespective of the method of payment or the form of salary that the employee receives, an employer must affiliate his employees to the Integral Social Security System. Employees are affiliated in order to cover them, principally, against the risks of general sickness, maternity, accidents at work and occupational sickness and invalidity, old age and death. Both parties in the relationship must pay the mandatory contributions.

The base for setting the amount of the Integral Social Security contributions in Colombia, is the salary earned by the employee, if he/she receives an ordinary salary. If the employee is paid an integral salary, the base is 70% of the amount agreed upon as the integral salary.

The value of affiliation for the employer varies between 18% and 28% of the employee's salary base as explained in the preceding paragraph, depending on the evaluation of the risk of the employee having a work accident or developing an occupational disease due to the nature of the activities performed by the employer’s enterprise, as determined by the law.

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Affiliation to the family compensation bureau

Family allowance is an employment benefit recognized in money, in kind or in services to employees that have lower employment income, in proportion to the number of the persons that are under his/her care. The family allowance is granted to employees to help economic contributions to sustain his/her family.

Employees who earn a salary less than four minimum legal monthly salaries have the right to obtain a family allowance in money, provided that he/she will work a minimum of ninety six hours per month and that the total income of the employee counting the income of his/her spouse or permanent partner does not exceed six legal monthly salaries.

Dress and shoes for employment

Employees earning a monthly salary which amount is equivalent to the value of twice the legal monthly minimum wage or less are entitled to receive from the employer every four months, totally free, dress and shoes appropriate for their labor.

Other employment benefits

Vacation

This benefit is equivalent to 15 consecutive days of paid vacation for each year of service. Upon termination, the employee is entitled to receive monetary compensation for the vacation that the employee may have pending on the basis of 15 working days salary for each full period of pending vacations and proportionally for fractions of a year.

Certifications and medical examinations

Upon termination, the employer must give the employee who applies for one, a certification showing the period of services, nature of the work, and wages earned; and, similarly, upon termination, if the employee so requests, to give him/her a medical examination and a certification with respect thereto, if upon admission or during the course of the employment the employee was subjected to a medical examination.

Transfer expenses

The employer must pay the employee the reasonable expenses for travel or relocation if the employee has to change his/her place of residence in order to take the employment, except if termination of the employment contract occurs due to the fault of the employee or is voluntary on his/her part.

Employment termination payments

If an employee is terminated without one of the proven just causes expressly set forth in the law by way of limitation, the employee is entitled to an indemnity for unilateral termination by the employer. The amount of this indemnity varies depending on the salary level of the employee and the duration of his/her employment contract.

a. For contracts entered into for an indefinite term of duration, this indemnity applies as follows:

For employees who earn less than ten (10) minimum legal salaries (for 2004 Col. Pesos $3.580.000), the indemnity is equivalent to 30 days of salary for the first year of service and 20 additional days of salary for each additional year additional year of service and proportionally for fractions of the year.

For employees who earn ten (10) minimum legal monthly salaries or more, the indemnity is equivalent to 20 days of salary for the first year of service and 15 additional days of salary for each additional year of service and proportionally for fractions of the year.

For employees who had completed more than ten (10) years of service as of December 27, 2002 the indemnity is equivalent to 45 days salary for the first year of service and 40 additional days of salary for each year subsequent to the first and proportionally for fractions of the year.

b. For contracts entered into for a fixed period or for the duration of a specific job, the indemnity is equivalent to the salaries corresponding to the unexpired period of the contract, but in the case of contracts for the duration of the job the indemnity cannot be less than 15 days salary.

Where the employer has failed to affiliate his employees to the Social Security System, pension rights or obligations may accrue. This will vary depending on seniority and specific circumstances of the employee.

Payroll taxes

Employers must affiliate to a Family Compensation Bureau and pay payroll taxes contributions by means of The Family Compensation Bureau, to the Institute of Family Welfare and to the National Apprenticeship Institute, in a percentage equivalent to 9% of monthly gross payroll. Payments have to be done within the first monthly ten (10) days to the Family Compensation Bureau which are affiliated the employer. The 4% of the contribution is allocated to the payment of the family allowance, the 3% is allocated to the Institute of Family Welfare and the 2% is allocated to the National Apprenticeship Institute.

These payroll taxes are deductible for income tax purposes.

Visas

Colombian immigration regulations provide for a number of visas, which can be issued to foreigners who are to be located permanently in Colombia, or wish to visit sporadically for business purposes. Visas are issued at the discretion of the Colombian immigration authorities; as there is no appeal procedure against such decision, it is advisable to review the documents to be presented with the authorities informally, prior to filing the application.

The most common visas are the work visa and the business visa.

The work visa

The work visa is multiple entry visa issued for a maximum of two years. It expires automatically if the foreigner is absent from the country for a period in excess of 180 continuous days. It is issued to foreigners contracted by a public or private entity or institution, or by an individual in order to enter or remain in the country to render specialized paid services. This visa is used primarily for management, technical and administrative personnel of private or public commercial entities who are relocated to Colombia from abroad in order to carry out specific positions in Colombian

branches or subsidiaries. This visa also covers those paid services carried out by academics required by higher education institutes, foreigners appointed by an entity of the Colombian Government, artists or sports persons, journalists who are foreign correspondents, and persons who arrived in Colombia to carry out urgent technical services and who are required to stay in Colombia for a period exceeding 45 days.

The spouse and children of the person obtaining a work visa may obtain a temporary beneficiary visa, which allows them to enter Colombia to study but does not entitle them to work.

The work visa is issued on the request of and under the responsibility of the entity, institution or individual requiring the services. This entity, institution or individual must inform the Foreigners Department of the Administrative Security Department ("DAS") of the hiring and termination of foreigners within sixty calendar days following the hiring or termination. This also applies where visas are renewed or changed and to the beneficiary visas. Those granted work visa or beneficiary visas must register with the DAS within 60 days following the issue of the visa and obtain the foreigner identity card.

The business visa

A business visa can be granted for up to four years, with multiple entries of up to six months. It expires automatically if the foreigner exceeds the term permitted to stay in the country. It is issued to foreigners who can show they are businesspersons who are entering Colombia to carry out business, go to meetings or carry out marketing studies. Persons entering Colombia under a business visa cannot settle in Colombia and the activities carried out in Colombia must not generate payment of a salary or fee in Colombia. Family members of the person granted a business visa, are not entitled to a beneficiary visa.

A work or business visa must be requested for the first time before the Colombian Consulate abroad in the last place of residence, or the country of origin of the foreigner requesting the visa. Renewals of both the business and work visas can be obtained before the Foreign Ministry in Bogotá D.C. or before the respective Colombian Consulates abroad. The requirements to obtain the visas mentioned above change periodically and should be verified.

Special indemnities

Indemnity for failure to pay wages, social benefits, etc. If the employer does not pay the employee the wages and social benefits to which he/she is entitled, upon the termination of the contract, (excepting the case of withholdings authorized by the law or expressly authorized by the employee in writing for each particular case), the employer must pay, by way of damages, a sum equal to one day's salary for each day of delay in the payment of salaries and social benefits. The application of

this so called "late payment indemnity" is limited to a maximum of 24 months counted as of the date of dismissal of the employee. After such period interest will accrue, but only on any unpaid salaries and social benefits.

In addition, the employer could be ordered to pay a special indemnity for not having deposited the accrued severance amount in a special severance fund, should he have failed to comply with the obligation. This indemnity is equivalent to the payment of one day of salary for each day of delay in the depositing of the accrued severance, counted as from February 15, of each calendar year, up to the date of termination or making the deposit, whichever occurs first.

Competition Law

Colombian competition laws comprise two main sets of regulations: (i) unfair competition law; and, (ii) antitrust law.

Unfair competition law sets forth rules against dishonest or fraudulent competition in trade and commerce, while antitrust law protects free access to the market by preventing or prohibiting conduct or behavior that restricts or tends to restrict free competition in the Colombian market, and prohibits abusive exploitation of a dominant position in the market.

Unfair competition law

Unfair competition law prohibits unfair competition, defined as any behavior or act carried out by any person or entity in the relevant market with the intention of competing in the market, when such act or behavior is contrary to sound mercantile practices, is not based on adequate good faith standards, is inconsistent with honest practices in industrial and trade matters, when it is intended to or actually restricts the liberty of a customer to make a choice in the market or it restricts the operation of the market as a free trade market. It also prohibits specifically the following conducts:

a. deviation of clientele
b. disorganization of competitors
c. confusion of the market
d. misleading acts
e. discrediting of competitors
f. misleading comparison
g. misleading imitation
h. exploitation of third party reputations
i. violation of secrets
j. acts which induce someone to terminate or breach a contract
k. unfair advantage arising from the infringement of statutes
l. unfair exclusivity pacts

Certain acts that may be considered as unfair competition may also fit into certain conduct defined under Colombian criminal law as crimes against the social economic order.

Antitrust law

Antitrust law in general prohibits any type of agreement or arrangement which directly or indirectly has the purpose of limiting activities such as the production, supply, distribution or consumption of foreign or national raw material, products, merchandise or services; and all kind of practices, procedures and systems which tend to restrict free trade competition and/or inequitably maintain or fix prices (this includes, in principle, non-compete agreements). The agreements, covenants, contracts or transactions prohibited under antitrust law are null and void.

Antitrust law specifically prohibits acts and agreements contrary to free competition and the abusive exploitation of a dominant position.

In addition, there are special antitrust rules established in other statutes, which are based on principles established under the Constitution of Colombia, applicable to areas such as banking and finance, public utilities, power supply, telecommunications and marine transportation.

The Environment

Colombian environmental legal framework

The Colombian environmental legal framework is comprised of various legal instruments, most notably, international treaties, National Constitution of 1991, Law 99 of 1993 ("Environmental Law"), Decree 2811 of 1974, Renewable Natural Resources and Environmental Protection Code ("Natural Resources Code"), the different decrees and resolutions that have been issued to regulate the exploitation of each natural resource and rules issued by the Regional Autonomous and Sustainable Development Corporations ("CAR").

Other regimes, namely, use of land, health and safety rules, public services regime, administrative rules and criminal rules are equally applicable for environmental matters.

Environmental authorities

The main environmental authorities are the following:
Environmental, Housing and Territorial Development Ministry

The Environmental, Housing and Territorial Development Ministry ("Environmental Ministry") is in charge of defining the policies and regulations that rule the recovery, preservation, protection, ordering, management, use and exploitation of the renewable natural resources and the environment in order to guarantee sustainable development.

Regional Autonomous and Sustainable Development Corporations

The CAR are public nature corporative entities, comprised of territorial entities, in charge of administrating within the area of their jurisdiction the environment and the renewable natural resources tending to sustainable development. Territorial entities integrating the different CAR are determined on the basis of their geographic characteristics (equal ecosystems or the conformation of a geopolitical, bio-geographical or hydro-geographical unit).

Great Urban Centers

Municipalities, districts and metropolitan areas with more than 1,000,000 inhabitants, have the faculty to grant licenses, concessions, permits and authorizations, the issuance of which is attributed to the CAR.

Licenses and permits

The Environmental Law established the requirement of an environmental license for several projects and works. Prior to the issuance of said law in 1993, other rules required various permits and authorizations concerning the use of water, air emissions, amongst others. Currently, both environmental licenses and other permits are required by Colombian law. However, the environmental license may include all permits and authorizations required to use, exploit or affect natural resources during the project or activity.

Following is a general description of said licenses and authorizations:

Environmental license

An environmental license is the authorization from the relevant environmental authority to carry out a project or activity that may deteriorate natural resources. The projects, works and activities that require environmental license are expressly regulated in the law[3]. According to the Environmental Law, the Environmental Ministry grants environmental licenses for large-scale projects, such as the following[4]:

a. Exploration, exploitation, transportation and storage of hydrocarbons as well as the construction and operation of refineries.

b. Large- scale mining exploitation of coal, construction materials, metal and precious stones.

c. Construction of dams and reservoirs with capacity exceeding 200 million cubic meters of water.

d. Construction and operation of electric power generating units with installed capacity equal or superior to 100 MW.

e. Nuclear energy generation projects.

f. Construction and operation of maritime ports and international airports.

[3] Decree 1180, 2003, article 7.

[4] Further developed by Decree 1180, 2003, article 8. The CAR and Great Urban Centers grant environmental licenses for the same matters but in a smaller-scale, manufacturing industries, amongst others.

g. Construction of national scale roads and railways.

h. Development of projects affecting the national natural parks.

i. Production of pesticides.

j. Introduction to Colombian territory of foreign species, subspecies and varieties for purposes of reproducing them, that may affect the stability of local ecosystems or of wildlife.

Water regime

Use of water

The use and exploitation of non-maritime waters is regulated in the Natural Resources Code and further complemented by Decree 1541 of 1978. In general terms, rivers and all non-maritime waters are of public use and their exploitation requires a water concession. Said concessions are granted by the different CAR, indicating the obligations of the concessionaire, the term of the concession (generally 10 years), applicable fees, amongst others.

Additionally, Law 373 of 1997 establishes obligations regarding the efficient use of water.

Use of beds and beaches

According to the Natural Resources Code, the use of beds and beaches requires an authorization from the relevant environmental authority.

Water disposals

Decree 1594 of 1984 regulates liquid waste discharges. As a general rule, liquid wastes in the streets or systems for the sewage of rainwater are prohibited. Disposing liquid wastes in a water body requires a prior permit from the relevant CAR, while disposals in sewages require a registry with the relevant environmental authority.

Air regime

Atmospheric emissions

The Natural Resources Code establishes as a general rule that the discharge in the atmosphere of dust, vapors, gases and toxic emissions is prohibited, whenever surpassing the determined levels. Decree 002 of 1982 regulated the atmospheric emissions topic establishing air quality parameters, and maximum levels of permitted pollution.

Decree 948 of 1995 defines the cases where an atmospheric emissions permit is required, most notably, the following:

a. Controlled open burnings in rural areas.

b. Discharges of fumes, gases, vapors, dust or particles through ducts or chimneys of industrial, commercial or service establishments.

c. Incineration of wastes.

d. Boilers or incinerators operation by an industrial or commercial establishment.

e. Burning of fuels in ordinary operation, in gas and oil exploitation fields.

f. Production of lubricants and fuels.

g. Refining and storage of oil and its derivatives; and petrochemical manufacturing processes.

h. Operation of thermoelectric plants.

Sound

Decree 948 of 1995 establishes general regulations for the control of noise. In addition, the Ministry of Health issued Resolution 8321 of 1983 concerning protection and conservation regulations for audition, defining as noise contamination any sound emission that adversely affect the safety or the health of human beings, the property or its enjoyment, and defines the maximum admissible noise levels.

Offensive odors.

According to Decree 948 of 1995, activities generating offensive odors require a permit. Additionally, the Constitutional Court has considered odors in certain areas to violate fundamental rights.

Solid wastes

Non-hazardous wastes

According to article 35 of the Natural Resources Code, authorization is required for the discharge of wastes and garbage that deteriorate soils or cause damage.

Hazardous wastes

Hazardous wastes in Colombia are mainly regulated by the National Constitution of 1991, Law 253 of 1996 which approved for Colombia the Basle Treaty and Law 430 of 1998.

Article 81 of the National Constitution of 1991 as well as Law 430 of 1998 prohibits the introduction to the country of nuclear wastes or toxic wastes.

Law 430 of 1998 establishes that the generator of hazardous substances is liable for all the residues it generates, and such responsibility extends to its affluent, emissions, products and sub-products for all the effects caused on the health and the environment. The manufacturer or importer of a product or chemical substance with hazardous property is compared to a generator. The responsibility of the generator persists until the hazardous waste is exploited as input or finally disposed.

Indigenous and Afro-Colombian communities

The Environmental Law establishes that natural resources are to be exploited without harming the cultural, social and economic integrity of the indigenous and afro-Colombian communities. Equally, decisions regarding environmental matters should previously consult representatives of said communities. Additionally, the Environmental Law orders that their representatives make part of the different environmental consulting instances.

Remedies

In general terms, violation of environmental rules may trigger the following remedies:

Action for the protection of fundamental rights *(acción de tutela)*

Persons suffering injuries in their health or life as a consequence of contaminating activities that result in the violation of a fundamental right may resort to the action for the protection of a fundamental right in order to protect it.

Individual civil actions to repair injuries

Persons that have suffered an injury as a consequence of environmental contamination are entitled to claim indemnity under general rules of responsibility.

Group actions (*acción de grupo*)

When the number of persons that suffered injuries exceeds 20 and those injuries are attributable to the same cause (e.g. contaminating activities of an industry), they may jointly file a group action. The importance of the group action relies in the fact that indemnity of damages may be obtained even for individuals that were not within the process but that evidence that they suffered the damage for the same cause. These actions are regulated in Law 472 of 1998.

Collective rights actions *(acción popular)*

Any person on behalf of the community may file a collective rights action in order to protect the environment. These actions normally result in restoration and condemnation to the payment of an economic incentive in favor of the party that submits the action. These actions are regulated in Law 472 of 1998 as well.

Administrative sanctions

Administrative police measures may be adopted by the relevant authorities against individuals for infringement of environmental regulations. According to article 85 of the Environmental Law, the following measures can be taken:

a. Sanctions in the form of fines, suspension of the license or permit, temporary or final closing of the establishment, building or service, revocation of the concession or permit and demolition.

b. Preventive Measures in the form of verbal or written warning, confiscation of flora or fauna, suspension of the work.

Criminal liability

Although under Colombian law there is no criminal liability for the companies, administrators or shareholders of a contaminating industry may incur in criminal liability originated in facts attributable to the company they represent.

Intellectual Property

Trademark registration

Requirements for registration

Any sign that is apt for distinguishing products or services can be registered as a trademark in Colombia. Applicable law (which includes Andean Community provisions) establishes that, among others, sounds, odors, letters, numbers, a color within a shape, a combination of colors, and a product's shape, container or packaging, may be registered as a mark.

Some of the signs that may not be registered as a trademark are descriptive words, the usual shapes of products, signs that can deceive the consumer as to the origin of the product or service, and signs that can create an improper association with a geographic zone known for the quality of its products. Applicable law allows the registration of descriptive words or colors per se, when due to their use in the country, the sign has become distinctive to identify a product or service.

An additional prohibition for trademark registration in Colombia is when the sign violates the rights of third parties, if the mark is confusingly similar to a previous application or registration, causing a risk of confusion or improper linkage between the goods/services covered by the marks (even if they cover different categories of goods).

A mark that is similar to a duly protected commercial name will not be accepted for registration if the goods or services covered by the mark are identical to those covered by the name, if there is risk of confusion or improper linkage between the products or services covered by the mark and the goods/services covered by the name.

A mark that is confusingly similar to a "notoriously known mark" may not be registered, regardless of the products or services for which registration is sought. Notoriously known marks are those that are recognized as such in any of the Andean Member countries "by the interested sectors".

Finally, the registration of a mark will be denied if it is established that the registration is sought in order to consolidate and/or maintain an act of unfair competition, provided that a legal unfair competition action has been filed before the corresponding public authority.

Procedure for trademark registration in Colombia

A trademark application may only cover one class of products and must contain, among other documents and information:

a. The name, address and domicile of the applicant;

b. The description of the sign whose registration is requested;

c. The indication of the exact products/services covered by the mark;

d. Payment of the governmental fees.

The date of filing will be the date on which the application is received by the Colombian Trademark Office (Superintendency of Industry and Commerce). However, an application may claim as a filing date the date on which the goods or services distinguished with the mark were shown in an official fair (in any country). This previous date will be recognized provided that the application is filed within the next six months after the goods or services were shown. Likewise, priority rights are granted for a 6-month period to the first application for a mark that is filed in another Andean Community country, or in any other country that grants reciprocal rights to applications originating from Andean Community Member Countries.

Once filed, an application may only be amended in respect to secondary aspects. No amendments can be made to the mark itself, nor may the scope of the products or services covered by it be broadened.

If the application meets the basic formal requirements, the Trademark Office will order its publication for opposition purposes. Once published, any interested third party may oppose the application, within 30 days of the publication date. A 30 day extension may be requested to file documents or evidence to support the opposition.

The owner of an identical or similar mark or application in any Andean Member Country for goods or services which could lead the public to error, may oppose a third party application in Colombia. However, the opponent is required to file his own application for said mark in Colombia.

If an opposition is filed, the Colombian Trademark Office will notify the applicant and grant him a non-extendable 30-day period to respond. A 30-day extension is available to file additional documents.

Upon expiration of the opposition stage, the Colombian Trademark Office will proceed to grant or reject the application.

Rights granted by the mark

The exclusive rights over a mark in Colombia are acquired only by means of registration in this country (i.e. there is no such thing as regional or Andean registration).

Registrations are granted for a ten-year period, renewable indefinitely for successive ten year periods.

There is a six-month grace period for renewals. Additionally, should the previous owner of a mark that has lapsed for lack of renewal re-file for the same mark in the following six months (after lapsing), no citations or oppositions will be permitted based on third party registrations that co-existed with the expired mark.

The protection of a registered mark in Colombia is usually limited to the particular class in which it is registered, but can be extended provided that the owner of the mark can demonstrate a relationship between the goods covered in the different classes. This is because applicable law allows the owner of a mark to take action against a third party who, without his consent, carries out infringing acts with respect to "identical or similar products or services" to those for which his mark is registered.

The trademark titleholder will not be able to prevent the use in good faith of the mark by third parties to promote (even in comparative advertisement), goods that may be compatible with the goods covered by the registered mark. In this case the use of the mark must be restricted exclusively to the purpose of giving information to the public and should not create confusion as to the origin of the products.

Likewise, the registration of a mark does not allow its owner to stop a third party from using the same with respect to products originating from the owner, a licensee or any other authorized person, that have been sold or legally introduced into the market of any country by them, provided the characteristics of the products and the package in direct contact with the product have not been modified or altered during the commercialization process.

Cancellation of the trademark registration

A mark that has not been effectively used by its owner or duly recorded licensee in Colombia during a period of three years immediately preceding the date on which the cancellation action is lodged, may be cancelled. Applicable law allows the partial cancellation of a registration of goods in relation to which the mark is not being used.

In this case, the burden of proof as to the use of the mark lies on the owner of the mark. A mark has

been in use when proven that the products or services that are distinguished by such mark are in the market in a manner and quantity that would normally correspond to the given product or services.

The use of a mark in a manner other than that for which it was registered will not give rise to its cancellation for non-use, provided that the differences arise only as to mere details or elements that do not alter the mark's distinguishing elements.

The plaintiff who is successful in canceling a mark in Colombia will have a preferential right to its registration in the country if he files his application within three months following the date of the final decision on the cancellation action.

An additional cause for cancellation of a registration is when its owner has allowed or tolerated that the mark becomes a sign of common use or a generic word (thereby losing its distinctiveness).

The trademark owner may also voluntarily request the total or partial cancellation of its trademark registrations.

Annulment of the registration

If a mark is granted or rejected in violation of any of the various provisions regarding the registration of marks, any interested party has the right to request the annulment thereof. Applicable law establishes a limit of four months for the filing of an annulment and reinstatement right action that is based on third party rights (counted as from the date in which the official writ denying or granting a mark becomes firm). Annulment actions that are based on the rights of public interest have a statute of limitation of five years.

Expiration of the registration

If a trademark registration is not renewed opportunely, it will lapse. Applicable law establishes the possibility of making periodic payments (a system similar to the patent annuities). The registration of the mark in Colombia will lapse in the event of failure to cover any of these payments.

Invention Patents

Requirements for obtaining a patent

Under Colombian Law, patents are granted to all inventions pertaining to any field of technology, always and when they are new, hold an inventive step and are industrially applicable.

As Colombia is an active member of various international agreements, such as, The Andean

Community, The Paris Convention, The World Trade Organization including the TRIPS, The UPOV and the Patent Cooperation Treaty, anyone can benefit from any of those treaties and may have different options and ways to file patent applications in order to protect their inventions.

Exceptions to patentability

Among the several prohibitions for patentable matter in Colombia, there are four subject matters that are currently not patentable or are being denied patents due to current interpretational Patent Office practice. Thus, special care should be taken for cases to be filed in Colombia when the following is claimed:

a. Therapeutic or surgical methods of treatment for animals or humans, as well as diagnostic methods.

b. Uses. Prohibited due to a narrow interpretation of Article 14 of Andean Decision 486 being applied by the Patent Office. Article 14 states that patents shall be granted for inventions "whether they be products or procedures". The Patent Office holds that since a use is neither "product" nor a "procedure" it is not patentable. (This office has been arguing at an administrative, political and diplomatic level to have this position changed. There is also pending litigation on this point that will be decided by the Andean Tribunal of Justice).

c. Novel uses. Prohibited due to an interpretation of Article 21 of Andean Decision 486 being applied by the Patent Office. Article 21 states that "patented products or procedures, comprised in the state of the art … may not obtain a new patent simply because a different use is attributed to that originally comprised by the initial patent". Again this office has been arguing at an administrative, political and diplomatic level to have this position changed. There is also pending litigation on this point that will be decided by the Andean Tribunal of Justice.

d. Functional characterizations. Current Patent Office practice has strongly objected to functional characterizations of pharmaceutical compounds; e.g., therapeutic indications or biochemical functions. In great part, the basis for this position is related to their unwillingness to grant patents for novel uses. This offices believes that functional characterizations could be interpreted to mean they accept that such characterizations (some of them uses of the compounds) constitute a patentable characteristic.

Rights granted by a patent

Patents are granted for a term of twenty (20) years counted as from the patent application filing date.

The scope of the protection is given by the claims of the application. The description and drawings will serve the interpretation of the claims.

The granted patent gives the right to exclude third parties from carrying out action, such as manufacture, use, offer for sale, sell, import the object of the granted protection.

Exception to the rights

a) acts carried out privately and for non-commercial purposes, for experimental purposes, for teaching purposes or scientific or academic research;

b) when the patent protects biological material, except plants, capable of being reproduced, to utilize it as the initial basis for obtaining a new viable material, except when such obtention requires the repeated utilization of the patented entity;

c) A patent shall not confer to patentee the right to prevent third parties from carrying out trade acts with respect to a product protected by the patent, after the product has been introduced into commerce in any country by the patentee, or by any other person either authorized or economically related to him.

Obligations of the owner of the patent

The patentee must work the patented invention, either directly or through any person duly authorized by him.

In case the patented invention has not been worked, after a three year term from the grant of a letters-patent, or a four year term from the filing date of the application, whichever occurs later, third parties may obtain a compulsory license.

Nullity of patents

The Patent Office or any interested party, and at any time, may request the absolute nullity of a patent, whenever the purpose of the patent does not constitute an invention according to the law, the invention does not meet the patentability requirements, the patent was granted for an invention comprised under exceptions of patentability, the patent does not sufficiently disclose or describe the invention, the claims included in the patent are not entirely supported by the description, the patent granted contains a broader disclosure than that of the initial application which would imply an extension of the protection, as the case may be, no copy of the access agreement was filed, as the case may be, no copy was submitted of the document accrediting the license or authorization to use

traditional knowledge of indigenous, Afro-American or local communities, pursuant to the provisions of the national legislation, reasons for absolute nullity of administrative acts would have been configured.

Cancellation of patents

For the purpose of keeping the patent enforceable, annuities are due for granted patents, and are payable yearly. The deadline for the payment of annual fees is the last day of the month of the filing date of the application. Two or more annual fees can be paid in advanced. Failure to pay said fees will result in cancellation of the patent.

Utility Model patents

Requirements for obtaining a patent

Under Colombian Law, utility model patents are granted to all new form, arrangement or placement of elements, of any device, tool, instrument, mechanism or other object or of any part thereof, which may allow a better or different operation, utilization or manufacture of the object it forms part of, or which may provide certain usefulness, advantage or technical effect which it did not have previously.

As Colombia is an active member of various international agreements, such as, The Andean Community, The Paris Convention, The World Trade Organization including the TRIPS and the Patent Cooperation Treaty, anyone can benefit from any of those treaties and may have different options and ways to file patent applications in order to protect their utility models.

Procedure and requirements for filing a utility model patent application in Colombia include:

i. Spanish translation of the application (description, claims and abstract);
ii. Certified copy of the Priority Document(s) together with a Spanish translation thereof. There is a term of sixteen months as from the filing date of the priority being claimed;
iii. Formal drawings (if applicable);
iv. Duly legalized Power of Attorney from the applicant.
v. Assignment from the inventor to the applicant.

The patent application process currently takes anything between two and four years, depending on the backlog at the Patent Office. After filing the application, if the examiner finds any formal

problems (legal or technical), a first Office Action will be issued within one month of the filing date, for which the applicant has one month to respond with a one month extension available. Having corrected any problems, the application should be published in the Official IP Gazette within the next six to eighteen months from filing date. Upon publication, third parties may file an opposition within thirty working days, for which the applicant has thirty working days to respond from the time of notification of said opposition(s), with a thirty working days extension available. Subsequently, the application will proceed to the substantive examination stage. This examination must now be formally requested within three months as of publication of the application, and this stage takes approximately twelve months or more. The Patent Office will issue the results of the substantive examination, for which the applicant has thirty working days plus a fifteen working days extension available to provide a reply. Finally, the Patent Office will notify the applicant of its decision through a resolution, which may be appealed within five working days, in case the patent is denied partially or in its entirety. If the appeal is denied, the applicant may, as a last resort, argue the case before the Council of State (the Supreme Court for Administrative Matters), within the next four months.

Exceptions to patentability

Plastic or architectural works, and objects of a purely aesthetic character are not considered utility models.

Processes and any matters excluded from protection by patents of invention cannot be subject matter of utility model patents.

Rights granted by a utility model patent

Patents are granted for a term of ten (10) years counted as from the patent application filing date.

Provisions concerning patents of invention contained in this Decision are applicable to utility model letters patent, as may be relevant, except in what relates to terms for processing, which shall be reduced to half the time.

Industrial design registration

Requirements for registration of an industrial design

Under Colombian Law, an industrial design is defined as the specific appearance of a product resulting from any gathering of lines or color combination, or from any external two-dimensional or

three-dimensional, line, contour, arrangement, texture or material, without changing the destination or purpose of the product.

An industrial design must novel in order to be registered.

Procedure and requirements for filing a patent application in Colombia include:

i. the form of application;
ii. the graphic representation of the industrial design. In the case of a two-dimensional design, incorporated into a flat material, the representation may be substituted by a sample of the product incorporating the design;
iii. the powers of attorney that may be required;
iv. the receipt of payment relating to the relevant charges;
v. the copy of the document evidencing the assignment to the applicant of
vi. the right to register the industrial design.

The design application process currently takes around two years, depending on the backlog at the Patent Office. After filing the application, if the examiner finds any formal problems (legal or technical), a first Office Action will be issued within one month of the filing date, for which the applicant has thirty working days to respond with a thirty working days extension available. Having corrected any problems, the application should be published in the Official IP Gazette within the next six to eighteen months from filing date. Upon publication, third parties may file an opposition within thirty working days, for which the applicant has thirty working days to respond from the time of notification of said opposition(s), with a thirty working days extension available. Subsequently, the application will proceed to the final decision through a resolution, which may be appealed within five working days, in case the design is denied. If the appeal is denied, the applicant may, as a last resort, argue the case before the Council of State (the Supreme Court for Administrative Matters), within the next four months.

Exceptions to patentability

The following are the exceptions to patentability:

a) industrial designs whose commercial working in the territory where the registration is being applied for must necessarily be hindered to protect

b) morals or public order;

c) industrial designs whose appearance is entirely based on the technical order; and

d) industrial designs consisting only in a form whose exact reproduction is necessary for permitting that the product incorporating the design be mechanically mounted or connected with another product of which it forms part.

Rights granted by the industrial design register

Design registers are granted for a term of ten (10) years counted as from the patent application filing date.

The granted design register gives the right to exclude third parties from carrying out action, such as manufacture, use, offer for sale, sell, import the object of the granted protection.

Exception to the rights

The registration of an industrial design does not give the right to prevent a third party from performing acts of commerce with respect to a product embodying or reproducing such design, after the mentioned product has been introduced into commerce in any country by its proprietor or by any other person under his/her consent, or economically related to him/her.

Nullity of industrial design registers

The Patent Office or any interested party, and at any time, may request the absolute nullity of a design register, whenever the purpose of the design does not constitute a design according to the law, the design does not meet the registrability requirements, the design register was granted for a design comprised under exceptions, and pursuant to the provisions of the national legislation, reasons for absolute nullity of administrative acts would have been configured.

Integrated circuits layout-designs

Definitions

- Integrated Circuit: a product, in its final or intermediate form, of which at least one of the elements is an active element and any or all its interconnections, constitute an integral part of the body or of the surface of a piece of material and that is destined to perform an electronic function.

- Layout-design: the three-dimensional arrangement of the elements, expressed in any manner, with at least one element being active, and the interconnections of

an integrated circuit, as well as such three-dimensional arrangement prepared for an integrated circuit to be manufactured.

Requirements for protection

Under Colombian Law, A layout design is protected when it complies with the novelty requirement.

A layout-design shall be deemed original when resulting from the intellectual effort of its creator and its not being usual in the industrial sector of integrated circuits.

Procedure and requirements for filing a layout-design application in Colombia include:

a) a request for filing the application;
b) a copy or a drawing of the integrated circuit layout-design and, when the integrated circuit has been commercialized, a sample of such integrated circuit;
c) as the case may be, a declaration indicating the date of the first commercial exploitation of the integrated circuit, in any place of the world;
d) as the case may be, a declaration indicating the year of the creation of the integrated circuit;
e) a description defining the electronic function to be performed by the integrated circuit which incorporates the layout-design;
f) a copy of every application for registration or other protection certificate applied for or obtained abroad by the same applicant or his successor in interest and which refers totally or partially to the same layout-design, constituting the subject matter of the application filed in the Member Country;
g) any powers required; and
h) the payment receipt of the established official fee.

The national competent office shall examine the subject matter of the application to ascertain whether or not it constitutes a layout-design according to the law. The Patent Office will not, *ex officio*, examine the originality of the layout-design, except when a grounded opposition is filed. In the event of omission or deficiency, a first Office Action will be issued within one month of the filing date, for which the applicant has three months to respond for the purpose of submitting the necessary correction. Having corrected any problems, the application should be published in the Official IP Gazette. Any interested party may file with the national competent office a grounded opposition, including information or documents that may be useful for determining the registrability of a layout-design. If the application complies with all the requirements, the layout-design is registered.

Rights granted by a layout-design register

The exclusive right is granted for a ten year term counted as from the earliest of the following dates:

a) the last day of the year during which the first commercialization shall have been carried out with respect to the layout-design in any place in the world, or

b) the filing date of the application for registration with the national competent office of the relevant Member Country.

The protection of a registered layout-design shall lapse in any event at the end of the 15th year counted as from the last day of the year when the layout-design was created.

The registration of an integrated circuit layout-design confers to its proprietor the right to prevent third parties from performing any of the following acts:

a) to reproduce, through incorporation into an integrated circuit or in any other manner, the protected layout-design, entirely or a portion of the same complying with the condition of the law;
b) to commercialize, import, offer for sale, sell or distribute in any manner the protected layout-design, or an integrated circuit incorporating such design; or
c) to commercialize, import, offer for sale, sell or distribute in any manner a product wherein the protected integrated circuit is embodied, only to the extent it continues to include a layout- design illicitly reproduced.

The protection afforded by the registration refers solely to the layout-design in itself, and does not comprise any notion, process, system, technique or information encoded or incorporated in the layout-design.

Exception to the rights

The registration does not confer the right to prevent the following:

a) acts performed in a private sphere and for non-commercial purposes;
b) acts performed exclusively for evaluation, analysis or experimentation purposes;
c) acts performed exclusively for teaching, scientific, or academic purposes.

The registration of a layout-design shall not afford the right to prevent a third party from carrying out acts of commerce in any country with respect to protected layout-designs of integrated circuits incorporating them, or of products containing such integrated circuits after having been introduced

by the proprietor or by any other person with the consent, from the former or economically related to him.

Nullity of protected layout-designs

The Patent Office or any interested party, and at any time, may request the absolute nullity of a protected layout-design, whenever the purpose of the registration does not constitute a layout-design in accordance to the Law, the registration does not comply with the protection requirements provided for.

Protection of plant varieties

Requirements for obtaining an obtentor's certificate

Under Colombian Law, breeders' certificates are granted to persons who have created plant varieties, insofar as the varieties are new, uniform, distinct and stable, and if they have been given a denomination that constitutes their generic designation.

For the purposes of this Decision, "created" shall be understood to denote the production of a new variety by the application of scientific skills to the genetic improvement of plants.

Colombia is an active member of The Andean Community, The Paris Convention, The World Trade Organization including the TRIPS and The UPOV.

Procedure and requirements for filing a plant variety application for registration in Colombia include:

The application for the grant of a breeder's certificate for a new variety shall comply with above-mentioned conditions and shall include:

- the name, nationality and address of the applicant,
- the common and scientific name of the species,
- an indication as to its genetic denomination,
- the country of origin of the new variety,
- the scientific aspect and its genetic origin and the countries where it has been registered, indicating the date of grant in those countries and it must be accompanied by a detailed description of the relevant breeding process.

In addition, should the Plant Varieties Office consider this necessary, the application shall likewise be accompanied by a live sample of the variety or the document evidencing the deposit thereof.

Rights granted by a breeder's certificate

The obtentor of a registered new plant variety can prevent third parties from utilizing the protected variety and the products essentially derived therefrom. Infringement of the rights granted by virtue of the certificate of obtentor will be subject to legal actions as established by law.

The duration of the protection shall be twenty-five years for vines, fruit and forest trees, and twenty years for other species, counted as from the date of grant.

Once the right is granted the holder or obtentor must pay annuities for the maintenance of the right.

Patent and trademark litigation

Colombian law provides for criminal sanctions for trademark, patent and copyright infringement, as long as a criminal intent is proven. In principle, criminal intent may be shown where the defendant has received actual notice of the existence of the trademark, patent or protected work. In any event, even where criminal intent is later not demonstrated, the Attorney General's Office will not release infringing merchandise, since a distinction exists between criminal liabilities for the infringing act per se and the disposition of infringing merchandise. Likewise, it will not condone future acts of infringement, as clearly the defendant will be on notice as to the criminal nature of its conduct.

Colombian criminal procedure also allows the trademark, patent and copyright holder to claim damages resulting from the accused acts of infringement. Under Andean Community Decision 486, damages may be calculated using one of the following mechanisms: lost profits, unjust enrichment or reasonable royalties.

Under Colombian administrative law, an administrative act - such as the grant of a trademark or patent - is presumed valid until an administrative judge suspends its effects (in case of copyright the right is acquired as from the date of creation so there is no administrative act to suspend). Invalidity litigation typically lasts more than two years, during which the trademark and patent registration continues to be valid. Even though preliminary suspensions are procedurally contemplated, they have never been granted in IP cases. This presumption of validity creates a very favorable position for a trademark or patent holder in an infringement case since invalidity arguments will normally not have any immediate bearing on infringement liability.

Product registration

Colombian legislation requires that all products that affect human health directly or indirectly must obtain a permit from the health authorities, the National Institute of Supervision of Medicines and Food - INVIMA, which is a national entity, and part of the Ministry of Health and Social Protection.

A sanitary registration is issued once technical and legal requirements have been met and authorizes the sale of a product for ten years. The type of registration depends on the needs of the applicant, but can be for the import and sale, manufacture and sale, import, partial manufacture and sale, etc. The legal and technical requirements for each permit will vary, depending on the type of registration requested.

The main products for which sanitary registrations must be obtained are medicines, food, and cosmetics, cleaning products, alcoholic drinks, surgical and medical supplies and natural products, among others.

All medicines sold in Colombia, whether manufactured in Colombia or imported, must comply with the Good Manufacturing Practices, pursuant to the guidelines provided by the World Health Organization, thereby guaranteeing very high standards in the quality of medicines consumed in Colombia.

The same entity, INVIMA, in its capacity as health authority, supervises and controls the above products from their manufacture until they are placed on sale to consumers. This entity can apply health and safety measures to products or factories, which do not comply with the sanitary regulations and endanger the public health.

Finally, all advertising carried out in the mass media in Colombia on medicines and food must have prior authorization of the Advertising Committee of the INVIMA entity.

Telecommunications

Rules that were enacted pursuant to a gradual de-regulation and liberalization process that started in 1989 ended the State's monopoly in the provision of telecommunications services in Colombia and allowed private parties to provide them, generally in a regime of free and fair competition, to which both government and private sector operators are subject.

Although telecommunications services are considered to be a public service and the responsibility of the State, applicable law establishes that these services can be provided either directly by the State through government-owned or public-sector entities or indirectly through private (non-government) sector entities which have received the appropriate express authorization[5] and in some cases, directly by private entities without the need for an express authorization.[6]

Telecommunications Statute - Decree 1900 of 1990 ("Decree 1900").[7]

Legal Framework

Decree 1900 of 1990 was issued in an attempt to regulate the entire field of telecommunications services under one general piece of legislation. Although its applicability has diminished with the issuance of special regulations for certain services, it still embodies the general principles applicable to a number of telecommunications activities.

Governmental intervention and regulation

Pursuant to Decree 1900, the Ministry is the governmental entity in charge of intervening and regulating the telecommunications sector, in accordance with the plans adopted by the National Council for Economic and Social Policy ("CONPES").[8]

However, more recent regulations[9] created two new entities with authority to intervene and regulate certain areas of the telecommunications market, thus reducing the scope of the

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5 Decree 1900, Article 4.

6 The authorization to provide local public switched fixed telephony services, which are defined by law as essential public services, are considered to stem directly from the law, and thus any entity which meets certain minimum objective criteria is allowed to provide them without the need for any type of written governmental authorization (except where radioelectric frequencies are to be used, in which case the assignment and license to use these frequencies must be obtained from the Ministry).

7 Issued by the National Government pursuant to the authorization granted by Law 72 of 1989.

8 CONPES is an advisory body that indirectly regulates the telecommunications industry through broad economic and social policies.

9 Law 142 of 1994 in particular.

Ministry's authority. These relatively new entities are the Superintendence of Public Services ("SSP") and the Commission for the Regulation of Telecommunications ("CRT"). The two entities, as well as the scope of their authority will be described when reviewing special regulations of Law 142 of 1994.

Governmental authorization

As a matter of principle, the establishment, exploitation and use within Colombia, of national and international networks, systems and services (including the expansion and modification of same) require prior authorization from the Ministry of Communications (the "Ministry").[10]

The requirements for the Ministry to issue the authorization depend on the nature of the relevant network, system or service, as well as the particular competition regime to which they are subject.[11]

Specific services – definitions

As mentioned above, Decree 1900 was intended as a general telecommunications statute and as such attempted to classify all telecommunications services into various groups and to set forth the principles and regulations applicable to the various groups of services. However, since 1990 special legislation and regulations have been issued for a number of specific services, for which reason the classification of services contained in 1900 is in a number of cases purely academic.

Decree 1900 of 1990 classifies telecommunications services into six different types:

(i) Basic services: Bearer or carrier services[12] and teleservices[13] are included within this category.

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[10] Law 72 of 1989, Article 8. Decree 1900, Articles 4 and 34.

[11] For example, authorizations for the provision of value-added services or bearer services (which are subject to a regime of free competition) are issued on a case-by-case basis by the Ministry, in response to applications that must meet certain minimum requirements and must be submitted by entities meeting certain minimum objective criteria. A different rule applies to mobile cellular services, which can be provided only under one of the six concessions awarded by the Ministry in 1994, pursuant to a public bid process, whereby "duopolies" were established for a total period of 20 years in the three areas into which the country was divided for purposes of the provision of this service. On the other hand, the authorizations for the provision of services such as local public switched fixed telephony, which are defined by law as essential public services, are considered to stem directly from the law, and thus any entity which meets certain minimum objective criteria is allowed to provide this service without the need for any type of written governmental authorization (except where radioelectric frequencies are to be used, in which case the assignment and license to use these frequencies must be obtained from the Ministry).

[12] Bearer services are defined as those services that provide the necessary capacity for transmission of signals between two or more sites of the telecommunications network.

(ii) Broadcast services: Broadcast services are defined as those services in which the communication is made only in one way to several reception sites in a simultaneous way. Radio and television broadcast services are included within this category.[14]

(iii) Telematic services: These services are defined as those that by using basic services as support allow information exchange between terminals with established protocols. Facsimile services are included within this category.

(iv) Value Added Services ("VAS"): VAS are those services that by using a basic service as support, allow the transfer or exchange of information, adding new properties to the support system or satisfying specific telecommunications requirements. Encryption of data, wire transfer of funds and videotext are included within the definition of VAS.

(v) Ancillary aid services: These services are those services that have the purpose of protecting the safety of the people and the security of the State. Radioelectrical aid services, as well as maritime and air navigation services are included within this category.

(vi) Special services: These services satisfy cultural or scientific needs on a not-for-profit basis. Amateur radio is classified as a special service.

Non-authorized telecommunications services - fines and penalties.

Decree 1900 provides that any telecommunications service or network that operates without the required governmental authorization is clandestine and shall thus be suspended and the relevant equipment confiscated by the Ministry, without prejudice to the fines and penalties that may be applicable in each specific case.

Public Services Statute - Law 142 of 1994 ("Law 142")

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[13] Teleservices are defined as those services that provide the complete capacity for communication between users, including the functions or the terminal apparatus. Mobile and fixed telephony, as well as cellular telephony, trunking services, paging services, telegraphy and telex are included within this classification. However, please bear in mind that this classification is little use, since a number of services that would fall within this definition are already subject to specific regulations and distinct sets of rules.

[14] These services are subject to other statutes that contain a special and distinct set of rules.

Law 142 was issued in order to develop certain principles related to public services - that were embodied in the Political Constitution that was issued in 1991 - whereby certain types of services are considered to be essential for the wellbeing of the population and are subject to special rules to ensure that they are made available on a universal basis.

Law 142 defines fixed public switched telephony and local rural mobile telephony[15] as essential public services (*servicios públicos domiciliarios*), and as such subject to the specific provisions contained in this statute.

Telecommunications services regulated by Law 142

Public switched fixed telephony services include both local and long distance services, either national or international, and are defined as those basic telecommunications services consisting of the transmission of switched voice through the public switched telephone network (PSTN) with access to the general public.

Rural mobile telephony is the public switched telephony service whose users are located outside the urban perimeter and thus requires additional infrastructure to be operational.

Authorization

Pursuant to Article 10 of Law 142, any individual or entity, public or private, has the right to organize a company for the provision of essential public services. Such companies are denominated "public services enterprises" (*empresas de servicios públicos* – "ESP"), they are subject to corporate governance rules that are a bit more flexible than rules applicable to the generality of companies and corporations[16] and have certain prerogatives aimed at enabling them to provide their services more efficiently.[17] Article 22 of Law 142 further provides that, as a general rule, a duly incorporated ESP does not require any governmental authorization to exercise its corporate purpose.[18]

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[15] This definition expressly excludes cellular mobile telephony, which is subject to a specific regime contained in Law 37 of 1993. Services defined in Law 142 as being essential include the generation transmission and distribution of electric power, the transportation and distribution of combustible gas and the distribution and treatment of drinking water.

[16] Law 142, articles 19 et seq. For example ESPs can have an indefinite duration, can organize their capital structure and issue shares more freely.

[17] For example, ESPs are entitled to temporarily occupy land and obtain rights of way that may be required for the provision of service (Article 33)

[18] Law 142 does provide that certain activities – such as the use of the electromagnetic spectrum or to use public waters – still require concessions or licenses, and that ESPs are in any case subject to municipal planning and zoning regulations.

This general principle is applicable to the provision of local public switched telephony (except where radioelectric frequencies are to be used, in which case a license to use such frequencies must be obtained from the Ministry.)[19]

As an exception to the general principle, the provision of long distance public switched telephony services requires a license that must be granted by the Ministry pursuant to rules issued by the CRT. Under the current rules such licenses are available in a regime of free competition, provided that certain objective requirements are met by the relevant applicants (although certain regulatory measures have been taken to limit in practice the number of licenses available). [20]

General principles applicable to the provision of essential public services

Pursuant to Law 142, essential public services must be provided in accordance with the following basic principles (i) continuity,[21] (ii) quality and efficiency,[22] (iii) free competition, and (iv) respect for the rights of users.

Governmental intervention and regulation

Telecommunications ESPs are subject to the regulation of the CRT and the surveillance and intervention of the SSP.

The CRT

The CRT was created with the purpose of regulating and promoting competition within the sector in order to improve the efficiency and quality of those telecommunications services that are subject to its jurisdiction (which are, in principle, those services which are defined as being "essential" public services, namely local and long distance public switched telephone services). Telecommunications services which do not qualify as essential public services, or the provision of which do not affect an essential public telecommunications service (such as, in principle,

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19 Law 142, Article 22; CRT Resolution 87, Section 2.5.

20 Please refer to section 3.1.

21 ESPs and the State must take all steps required to ensure that the population will always have access to essential public services. For example, Law 142 provides that if the SSP considers that an ESP is not financially viable it must order that the steps necessary to ensure the viability of the ESP are taken; failing that, the SSP may order the liquidation of the ESP but only after ensuring that a suitable replacement is available.

22 For example, ESPs are not subject to government procurement and contract rules, regardless of the degree of participation of the State in their capital.

value-added services)[23] are not subject to the regulation of the CRT, but rather to regulations issued directly by the Ministry.[24]

Specific functions assigned to the CRT by law include:

(i) the establishment of rules to promote free competition in the telecommunications sector;

(ii) the resolution of conflicts between operators in order to guarantee free competition and efficiency in the provision of the service;

(iii) the establishment of general principles that operators must comply with in order to have access to the State telecommunications network;

(iv) the establishment of the requirements for obtaining long distance licenses; and,

(v) the establishment of the tariff structure for the telecommunications sector.

The SSP

The SSP is in charge of the surveillance over the providers of essential public services. Its main purpose is to protect the users, who are considered to be in a position of inferiority with respect to the services providers.

Foreign investment in telecommunications

As a general rule foreign investment in Colombia receives the same treatment as Colombian investment[25]. Foreign investment is only forbidden in activities related to national security or to the disposal of toxic waste.[26] No authorization to make a foreign investment is required, although

[23] Bearer services or mobile cellular services, although not defined as essential public services, are oftentimes subject to the CRT's regulation, in that they are used in the provision of public switched phone services or have a bearing in the manner in which these are provided.

[24] However, non-essential telecommunications services are subject to consumer protection rules issued by the CRT (Decree 1130, 1999; Law 555, 2000; CRT Resolution 489, 2002).

[25] Political Constitution of Colombia, Article 100, which provides that, as a general rule (and subject to certain limited exceptions) foreigners shall be granted the same treatment applicable to Colombian nationals; Law 9 of 1991, Article 15; Decree 2080 of 2000.

[26] Decree 2080 of 2000 and Resolution 51 of 1991 (as further amended).

it must be registered at the Central Bank in order to secure full dividend remittance and repatriation rights.

Foreign investment in telecommunications is subject to this general regime. Thus, with the exception of investment in radio and television broadcasting activities, foreign investment in this area of business has no restrictions. [27]/[28]

[27] Decree 1447 of 1995. Broadcasting activities can only be rendered by Colombian individuals or Colombian corporations, 75% of the capital of the latter must belong to Colombian individuals.

[28] Law 182 of 1995. Foreign companies can only own 15% of the capital of companies holding concessions for television programming.

E-Commerce

Basic Principles and legal framework for electronic commerce

In August 1999, the Colombian Congress enacted Law 527 of 1999 ("Law 527"), which provided the legal framework for the regulation of the access and use of data messages, of electronic and digital signatures and electronic documents for the carriage of goods. Law 527 is based on the United Nations Model Law on Electronic Commerce ("Model Law") in an attempt to adopt a legal framework according with international standards.

The basic principles of the Model Law, adopted by Law 527, are the following:

a. International character of the Law, which implies that, is application and interpretation must be aimed at maintaining an international uniformity in electronic commerce and electronic data flow.

b. Legal recognition of electronic data transmissions, which consists in not denying legal effects, validity or enforceability to information solely on the grounds that it is in the form of a data message.

c. Functional equivalence on electronic data messages by establishing that "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."

d. Subsidiary character of the provisions of the Law 527, by allowing that rules related to the generation, dispatch, receipt, storage or other processes related to data messages, may be varied by agreement between the parties involved.

e. Technological neutrality aimed at reducing the risk of obsolescence of the provisions of the Law.

Law 527

Law 527 regulates any type of information in the form of a data message, except when the information relates to:

(i) Obligations of the Colombian State pursuant to international conventions, agreements or treaties; or

(ii) The obligation of including written disclaimers or notices printed on certain type of products due to the risk that their marketing, use or consumption, entails.

Data message is defined as any 'information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, facsimile, telegram, telex or telecopy.

Validity of data messages and contract formation

In general, Law 527 regulates the formation, validity, characteristics and attributions of the data messages, as well as their time and place of dispatch and delivery. Within the aforesaid provisions, it contains regulations that specifically apply to the formation of contracts, including those that refer to offers and the acceptances via data messages.

Electronic signatures

Electronic signatures are also a matter of regulation of Law 527. As a general rule, it establishes that:

> Where the law requires a signature of a person, that requirement is met in relation to a data message if: (i) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (ii) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

Digital signatures are a special kind of electronic signatures, according to Law 527. The Law provides for a legal presumption that the originator of a data message had the intention of being bound by its contents whenever a digital signature has been affixed to the data message.

The digital signature will have the same legal force as a handwritten signature if conditions such as the following are met:

a. It is solely controlled by the person using it
b. It is verifiable
c. It is unique
d. It is attached to the data message in such a way that if the data message is changed or altered the digital signature will be invalidated

e. It is in compliance with the special regulations of the Colombian Government[29].

Carriage of goods

Law 527 also applies to any form of communication via data messages related to actions in connection with, or in pursuance of, a contract of carriage of goods and to the transport documents.

[29] Specific regulations on electronic signatures and certification entities are contained in Decree 1747 of 2000 and Resolution 26930/2000 and 36904/2001 of the Superintendence of Industry and Commerce.

Privacy

Privacy protection in Colombia has been developed by the Colombian Courts, from the principles set forth by the Colombian Constitution on privacy. Therefore, currently there is no law as such available in Colombia that governs privacy protection. However, the law on privacy protection may be passed before the end of this year.

While the law is enacted, privacy protection is based on the rulings issued by the Colombian Courts, founded on article 15 of the Colombian Constitution.

According to said article, all persons are entitled to be acquainted with, update and rectify their personally identifiable information – gathered, collected and stored in data bases and archives of public and private entities. In the collection, treatment and circulation of personally identifiable data, guarantees such as liberty and other Constitutional rights of the persons to which the data refers, must be protected.

Personally identifiable data may only be collected, recorded and kept with the prior, free and express consent of the owner of such data. The authority given to a manager of a database of storing certain personal information will not transfer its property to the database owner, as the property of the personal information is inalienable to the person that such information identifies.

Sharing of personally identifiable information is only possible for the purposes for which the person gave its consent to and only for lawful activities. According to the rulings of our Constitutional Court, personally identifiable information cannot be sold and it can only be transferred or assigned to third parties when the prior and express consent of the person is given.

Entities that collect information from persons and store them in their databases are bound to protect such information and comply with the following obligations:

- Personally identifiable data must be treated in a loyal and lawful manner.

- The collection of information of personally identifiable data must be done for explicit and legitimate purpose and must be used only for the purposes for which it was collected and for which collection was expressly authorized.

- The information collected must be pertinent and should not be excessive vis-à-vis the purpose for which it was collected.

- The data base manager must adopt all the necessary measures to guarantee that the personally identifiable data collected and stored is safe, accurate and may be updated when necessary. Such managers should provide the owners of the information with efficient tools that allow them to rectify, delete or block inaccurate information referring to them. All the security measures required to protect such information must be adopted.

- The information that enables the identification of a person should not be kept for a period that exceeds what is reasonable and necessary, based on the purpose for which it was collected.

In view of the foregoing, any transfers of personal information have to comply with the abovementioned premises. Otherwise, the transferee may be subject to civil claims for violation of privacy rights of the customers to whom the personal information refer to.

General litigation

Organization of the judiciary

The judiciary is independent from the legislative and executive branches in Colombia. Proceedings are usually written and there are no court fees to litigate.

There are several jurisdictions in Colombia: a specialized one for matters involving the State, similar to the French system, which is called the contentious administrative jurisdiction; there are also the criminal, civil, labor and employment, family and constitutional jurisdictions. The Superintendency of Industry and Commerce has a special jurisdiction to decide unfair competition and consumer protection matters; insolvency or debt reorganizing proceedings may be carried out before the Superintendency of Companies. There are procedural and substantive law codes for above-mentioned jurisdictions, similar to those in continental Europe.

Courts are divided into regions, the smallest claims being dealt with by municipal courts while larger claims are dealt with by circuit courts. Most decisions can be appealed, either before the regional tribunal or the Supreme Court, or in the case of the contentious administrative jurisdiction, before the Council of State.

Civil claims

Civil claims usually involve:

a. debt recovery proceedings (*procesos ejecutivos*) where title to the claim has been established, either by meeting the legal requirements, or due to a prior judicial decision. Collection proceedings may last from two to five years. Injunctive relief, such as assets freezing and attachment orders, is available in this type of proceedings.

b. ordinary proceedings, (*procesos ordinarios*) are essentially declarative, aimed to obtain from the Court a declaration with respect to the rights of the parties, to their liability, to the existence or validity of the acts or contracts executed by the parties, among others. These proceedings can take between three to ten years. Although asset freezing and attachment orders are not usually available, other measures are available such as the registration of judicial proceedings at the real estate registries or at the Chambers of Commerce where commercial establishments are registered, are applicable.

Constitutional rights

The Constitutional Court has two main functions: (i) to reviewing the statutes passed by Congress, in order to verify that they comply with constitutional mandates, and (ii) to deciding on claims brought by any person or entity when fundamental constitutional rights are violated. These latter claims called "*tutelas*", are extremely popular because the courts have to decide on these issues within fifteen working days. However, only claims for which no other legal remedy or proceeding is available, are admitted.

Arbitration

Both, local and international arbitration are a valid means of alternate dispute resolution in Colombia, provided that the matter of the dispute is subject to settlement, (i.e. it does not affect public policy provisions), and arbitration has been expressly agreed upon by the disputing parties. The Chambers of Commerce of Bogotá and Medellín have very experienced arbitrators who have acted in disputes between Colombian nationals as well as between nationals and foreign entities, involving millions of dollars. aArbitration centers have their own procedural rules and tariffs.

It takes approximately one year to obtain an arbitration award. Although there is no right to appeal an arbitration award in Colombia, the unsuccessful party may request the Civil Tribunals, under specific circumstances predetermined by the law, to declare null an void the arbitral award (*recurso de anulación*). Arbitration has become increasingly common, as it is a more agile method of resolving disputes in Colombia.

International arbitration is also acceptable under Colombian law, providing that there is a foreign element in the given contract (e.g., a foreign creditor; assets located abroad; obligations to be performed abroad, a foreign party to the contract).

Enforcement of foreign judgments

Colombia is a signatory of the U.N. Convention on Enforcement of Foreign Judgments. A final judgment or award granted outside Colombia, pursuant to the applicable foreign laws, and which is obtained without fraud and after due service of process, is enforceable by Colombian courts provided that a judgment rendered by a Colombia court would be enforceable in the given foreign jurisdiction, on a reciprocal basis, and that the judgment or award: (i) does not relate to the rights of real property located in Colombia at the time the suit was filed; (ii) does not contravene any public policy laws or regulations of Colombia, (other than those governing judicial proceedings); (iii) is a final judgment or award not subject to appeal in accordance with the applicable foreign laws; (iv) does not relate to a matter upon which Colombian courts have exclusive jurisdiction; (v) does not relate to a matter subject to a lawsuit brought in Colombia, that have been already decided by a Colombian court; (vi) was obtained with compliance of the applicable foreign laws relating to

service of process on the defendant, compliance that is presumed if the judgment or award is not subject to appeal; and (vii) is submitted to the exequatur procedure before the Colombian Supreme Court.

As mentioned in the section on security interests, the exequatur procedure is very demanding and the rules are strictly applied, so even though the Supreme Court does not reopen the merits of the case, a substantial number of applications for exequatur are rejected for lack of compliance with the applicable formalities, particularly for lack of sufficient evidence to prove the applicable foreign law. Therefore it is advisable where possible to bring judicial actions in Colombia or agree that Colombian law and forum are applicable, where the other party has assets in Colombia.

If the exequatur is obtained, the foreign judgment will, as a general rule, be enforced by means of an executive judicial action in which the debtor may request and obtain the attachment of assets in Colombia and the sale thereof in a public auction.

* * * * *

October 27, 2004

APPENDIX

Recent Economic Indicators for Colombia at 26 October, 2004	
Exchange Rates	
Market exchange rate of pesos required for one dollar *	$2,568.11
Market exchange rate of pesos required for one Euro	$3285,90
Devaluation	
Year to date	-7,56
Last 12 months	-10,60
IPC (Consumer Price Index) – 30 September, 2004	
Year to date	4,90
Last 12 months	5,97
Interbank Overnight Rate (E.A.)	6,85
Libor	
1 year	2,4413
6 months	2,2400
3 months	2,1194
1 month	1,9588
Euribor	
1 year	2,265
6 months	2,183
3 months	2,147
1 month	2,091

* Certified by the Banking Superintendence

Table Source: Colombian foreign trade bank (Bancoldex) at 26 October, 2004

According to the Financial Report on Colombia at 26 October, 2004 prepared by *Corporación Invertir en Colombia* "Coinvertir", citing figures from the Central Bank, during 2003, Colombia registered one of the highest economic growths in Latin America. With a growth of 3.95% set against 1.5% of the region, the performance of the Colombian economy was better than the

expected, and was the highest growth of the last eight years. According to Coinvertir, the forecasts indicate that the economy will grow at a 4.0% rate in 2004. In December 2003, the inflation rate stood at 6.49%, the lowest inflation rate in the last 40 years. The Central Bank's inflation target for 2004 is 5.6%.

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