Selected Legal Aspects of Doing Business in Colombia 2017
Doing Business in Colombia
A Guide to Legal Issues

2017
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Introduction

Colombia remains one of the most economically and politically stable countries in Latin America and is an increasingly attractive place for foreign companies to do business.

This guide explains the key features of the country’s legal framework, with a focus on the commercial and practical implications for clients.

Whether you are looking to expand existing operations in the region or are considering an initial investment, this guide provides a checklist of legal issues and explains how they may affect your business.

Basic facts and figures

Colombia has the third largest population in Latin America (after Brazil and Mexico) and the fourth largest economy. It is one of the longest-standing democracies in the continent, with a modern institutional framework based on separate executive, legislative and judicial branches of state and an independent central bank.

The country continues to enjoy economic stability, largely due to well-established orthodox financial management practices. Low inflation, the availability of financing and an “investment-friendly” political environment mean many sectors are attractive to investors.

Unlike some South American countries, Colombia has several major cities, the largest being the capital Bogotá, then Medellín, Cali and Barranquilla. Many multinationals choose to base regional operations here, thanks to a skilled workforce and experienced executives.

Why invest now?

Colombia received global attention at the end of 2016, thanks to an historic peace deal ending conflict with the FARC. This is expected to increase investor confidence and opportunities in many sectors.
While such international recognition provides a welcome focal point for the country’s progress, less publicized financial and legal reforms have continued to modernize the business landscape.

The aim of the current government is to keep unemployment and inflation down, develop infrastructure and agricultural, and stimulate tourism, real estate, housing and innovation.

Tax reforms in 2017 saw the adoption of IFRS accounting standards and reduced corporate rates. This built on adherence to several key international treaties and the ongoing OECD accession process, helping to bring Colombia in line with global best practice.

How can we help?

With 77 offices in 47 countries around the world, Baker McKenzie is the premier global law firm. We have been established in Colombia since 1979, longer than any other international law firm.

This means that as well as understanding where you come from and how you do business, we understand Colombia and can explain the laws, risks and opportunities in a way which makes sense for you.

Major geopolitical events, such as Brexit in the UK and the new administration in the USA, provide a constantly changing and challenging global market. Our lawyers collaborate across borders, markets and industries to provide practical, innovative solutions.

For further information or to discuss how we can help, please contact us using the details at the end of each chapter.
Financial values

Financial values in this guide are given in Colombian pesos ("COP"), followed by an indicative equivalent in US dollars ("USD"). The USD value has been calculated using a rate of COP 2,900 to USD 1.

Exchange rate changes mean the indicative USD values given in this guide may not be accurate. We recommend using the exchange rate at the time of reading to convert COP values into their equivalent in USD or other foreign currency.

Under Colombian law, many financial thresholds and maximum fines are defined as multiples of the legal minimum monthly wage. The minimum monthly wage is updated annually, which means financial thresholds and maximum fines also change annually.

Recent trends in minimum monthly wage increases are shown below:

<table>
<thead>
<tr>
<th>Year</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>COP</td>
<td>616,000</td>
<td>644,350</td>
<td>689,455</td>
<td>737,717</td>
</tr>
<tr>
<td>Increase</td>
<td>4.5%</td>
<td>4.6%</td>
<td>7.0%</td>
<td>7.0%</td>
</tr>
</tbody>
</table>
1 Foreign Investment Regime

Investments in Colombia made by foreign individuals or companies receive the same treatment as those made by Colombian nationals. This chapter outlines the most common types of foreign investment and lists Colombia’s international trade and taxation treaties.

Encouraging foreign investment is a long-standing feature of Colombian economic policy and successive governments have introduced measures to liberalize regulatory procedures in this area.

Foreign entities have a wide range of options, both when deciding how they wish to structure investments or finance operations in Colombia, and when they wish to repatriate that investment.

We advise clients on all aspects of foreign investment, from the broad principles described above, to the detail of Colombia’s regulatory exchange and investment regimes.

1.1. Form of investments

Foreign investments can be made in all areas of the economy, the only exceptions being for activities related to defense, national security and the processing of toxic, dangerous or radioactive waste not generated in the country.

In general, a Colombian company may be 100% foreign-owned. The only restriction applies to radio and television broadcasting companies, which must be 60% Colombian-owned.

Common types of foreign investment include: shares or other similar interests in companies, joint ventures or non-profit entities; real estate; trusts (fideicomisos); portfolio investments and private equity funds.

Such investments may be made in the form of foreign currency, imports of tangible assets, contribution of intangible assets (such as trademarks and patents) and funds in Colombian pesos.
1.2. Registration

Foreign investments must be registered with the Central Bank. Registration is important as it guarantees investors access to the formal exchange market to remit dividends and repatriate returns.

Failure to register means the investor may have to rely on the free market for access to convertible currency. While fines can be levied for failing to register, these are expected to be phased out under reforms from the Central Bank.

Registration is generally a simple process and can occur automatically upon the receipt of currency in the country. In some cases, a document will need to be filed with the Central Bank. The registration of foreign investment must be updated annually with the Central Bank.

1.3. Portfolio investments

Portfolio investments in Colombia must be made through an authorized manager. Regulated broker dealers, trust companies and investment management companies are authorized to act as managers.

Such managers represent the offshore investor and are responsible for complying with tax, foreign exchange, and regulatory obligations.

An offshore investor acting through a fund manager is authorized to carry out securities lending or borrowing activities, enter into derivatives and grant collateral.

1.4. Bilateral investment treaties and double taxation treaties

At the start of 2017, Colombia had free trade agreements with the USA, Canada, the European Union, European Free Trade Association (Iceland, Lichtenstein, Norway and Switzerland), Chile, the Caribbean

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1 Defined as foreign investments in (a) shares or securities registered in the national register of securities (Registro Nacional de Valores), (b) investment funds, or (c) depository certificates of securities
Community (applicable to 12 countries), South Korea, the Pacific Alliance, Mexico and the Latin American trade bloc Mercosur.

Free trade agreements have been signed with Israel and Panama. Colombia is also negotiating a number of bilateral investment treaties with countries from all over the world, including Japan and Turkey, as well as the multilateral Trade in Services Agreement.

Colombia is a member of the Andean Community ("CAN"), the Latin American Integration Association ("ALADI"), Mercosur and the Pacific Alliance.

Double taxation treaties under the OECD guidelines are in force with Canada, Chile, Czech Republic, India, Mexico, Portugal, South Korea, Spain and Switzerland. Taxation treaties with France and the UK have been signed and are undergoing approval procedures. Colombia is also in the process of negotiating tax treaties with several other states. There are also double taxation provisions within the CAN.

1.5. Contact us

For further information and advice on complying with the regulatory regime, please contact Jaime Trujillo or Clare Montgomery:

Jaime Trujillo  
+57 1 634 1570  
jaime.trujillo@bakermckenzie.com

Clare Montgomery  
+57 1 634 1554  
clare.montgomery@bakermckenzie.com
2 Exchange Regime

Colombia has a floating exchange regime which operates as part of a wider inflation-targeting economic policy. This chapter outlines the key regulatory requirements of the exchange regime and the policies regarding foreign loans and derivatives.

The Colombian Central Bank monitors currency flows and purchases foreign currency to ensure stability, but in general it does not restrict the free-flowing exchange market.

As a result, while businesses are not restricted, in principle, from foreign currency movements into or out of the country, they do have to comply with the related reporting and regulatory requirements.

We help clients ensure that any currency operations will comply with those regulations, from simple import and export payments to complex offshore financing, derivatives and security interests.

2.1. General rule for payments

The general rule is that payments for goods or services between Colombian companies or resident individuals must be made in Colombian pesos. This means that foreign investors will frequently need to exchange foreign currency into Colombian pesos to make payments and carry out business in the country.

Exceptions to this rule include payments made from offshore accounts registered with the Central Bank (which can be used to make payments in foreign currency) and for certain companies in the oil, gas and mining sectors. These are discussed in sections 2.4 and 2.5 below.

2.2. Formal exchange market

Most business transactions which require an exchange of foreign currency into pesos, or pesos into foreign currency, are regulated and the exchange must be made through an authorized channel.
The authorized channels will be either a registered foreign exchange intermediary (“FEI”) (which include Colombian banks and some financial institutions) or a registered offshore account (see section 2.4 below). This is known as the formal exchange market.

The following transactions are regulated and must take place through the formal exchange market:

- Import and export of goods
- Foreign currency loans and related earnings (made or received by Colombian lenders/borrowers)
- Foreign investments in Colombia and related earnings
- Colombian investments abroad and related earnings
- Financial investments in securities issued or assets located abroad and related earnings, except when investment is made with currency that does not need to be transacted through the formal exchange market
- Guarantees in foreign currency
- Derivatives

All other foreign currency transactions, for example the payment for services, may be made through the so-called free market.

Further information on foreign loans and derivatives is given in sections 2.6 and 2.7 below.

2.3. Exchange declaration

All operations carried out through the formal exchange market must be registered with the Central Bank using an exchange declaration.

Clients will need to complete the exchange declaration provided by their FEI, who will then forward it to the Central Bank. In some cases, clients must file exchange declarations directly with the Central Bank.
2.4. Foreign currency accounts

Colombian banks do not generally offer foreign currency accounts, save for exceptions such as embassies. Colombian companies and individuals may maintain offshore accounts in foreign currency.

If the offshore account is registered with the Central Bank it is known as a “compensation account”. Compensation accounts can be used to make payments in foreign currency which would normally be required to be made in Colombian pesos under the general rule. They can also be used to carry out transactions in the formal exchange market.

2.5. Special regimes for oil, gas and mining

A special regime for the oil, gas and mining sectors provides an exemption to the general rule that payments must be made in pesos.

Colombian companies that have received foreign investment and have been certified as operating in the oil, gas or mining sectors, may make and receive payments among themselves in foreign currency. Other than this, they are subject to the normal foreign exchange regime.

Branches of foreign companies in the oil, gas and mining sectors may also make and receive payments in foreign currency.

Such branches do not have access to the Colombian exchange market to acquire foreign currency (with limited exceptions for proceeds from goods or services paid in pesos and repatriation of sums upon liquidation), so they are permitted to register payments for goods and services made by their principal office abroad as equity contributions to their capital.

2.6. Foreign loans

Colombian companies and individuals may obtain loans in foreign currency from Colombian banks or from any overseas entity.
All foreign lenders and funds received from abroad must be registered with the Central Bank. The debtor must also register the foreign debt with the Central Bank.

Intercompany loans in foreign currency granted by non-Colombian parent companies to their Colombian subsidiaries are permitted (however, there are restrictions on branches of a foreign company receiving loans from their principal office abroad – see section 3.1.4 for further detail). Colombian subsidiaries may also loan funds to their foreign parent companies or affiliates.

2.7. Derivatives

Companies and individuals in Colombia may enter into derivatives with foreign entities, provided the entities meet the regulatory requirements set by the Colombian Central Bank.

Financial derivatives (e.g., exchange rate, interest rate and security index) and those based on commodities are permitted. In general, derivatives may be used for hedging, investment or speculative purposes (the law bans some regulated entities, such as pension funds, entering into speculative derivatives).

Derivatives must be settled in US dollars, euros or any other reserve currency indicated by the Central Bank.

Authorized derivatives include forwards, swaps (including credit default swaps) and options (and combinations of these), caps, floors and collars. Netting and re-couponing of payment obligations are allowed for foreign exchange purposes.

Derivatives must be duly and promptly registered with the Central Bank (other types of registrations may apply, depending on the nature of the parties and agreement). Correct registration (among other requirements) is necessary for close-out netting to operate. Failure to register may also generate substantial fines.
2.8. Contact us

To discuss how the exchange regime may affect your business, please contact Jaime Trujillo or Clare Montgomery:

Jaime Trujillo
+57 1 634 1570
jaime.trujillo@bakermckenzie.com

Clare Montgomery
+57 1 634 1554
clare.montgomery@bakermckenzie.com
3 Corporate Structures

Businesses carrying out permanent activities in Colombia are required to set up a company in the country. This chapter outlines the most commonly used corporate structures and explains the key differences when choosing between them.

The World Bank ranks Colombia as one of the easiest countries in Latin America in which to start a business. This is thanks partly to its simplified corporation model, a streamlined and flexible limited liability structure which has been widely copied across the region since its introduction in 2008.

Whether you are opening an office in Colombia for the first time, or a global reorganization requires a share transfer, merger or split of existing operations in the country, we can help you choose the most appropriate corporate structure for your business.

3.1 Selecting the most appropriate corporate structure

The four most common corporate structures are the (i) simplified corporation, (ii) traditional corporation, (iii) limited liability company and (iv) the branch of a foreign company. A brief description of each is given below, followed by a table comparing the key characteristics.

The organization and corporate governance of Colombian companies follows international norms and will be familiar to businesses. One point to note, is that while directors perform many of the same decision-making functions, they do not hold the power to legally bind the company (as is common in North America and Europe). This power is held by an officer known as the Legal Representative, who is separate from the directors and will be appointed by the company.

3.1.1 Simplified corporation – Sociedad por Acciones Simplificada (SAS)

The simplified corporation is the most popular corporate structure, both for new businesses entering the Colombian market and for existing enterprises looking to restructure. They can have a single shareholder and do not require a board of directors, so can be run by a
single manager who will be the Legal Representative. They may not be used for banks, insurance companies or listed companies.

Quicker and less costly to establish than other corporate structures, they are appropriate for large business groups, joint ventures and smaller single-owner operations. As a result, many established Colombian businesses are converting into simplified corporations.

Key features of a simplified corporation:

- Separate legal entity from its shareholders
- No restriction on number of shareholders, can be individuals or companies
- Liability of shareholder(s) limited to capital contribution
- Legal Representative will have power to bind company
- No requirement for board of directors
- Statutory auditor only required once assets or income exceed annual threshold\(^2\)
- Shareholders can treat company as a pass-through entity for tax in some jurisdictions

3.1.2 Traditional corporation - *Sociedad Anónima* (SA)

The traditional corporation is common among large businesses with multiple shareholders and substantial capital contributions. It must be used by banks, insurance companies and publicly traded companies.

Key features of a traditional corporation:

- Separate legal entity from its shareholders

\(^2\) The annual threshold for 2017 is COP 3,447,270,000 (USD 1,188,713) for gross assets and COP 2,068,362,000 (USD 713,228) for gross income
Minimum of five shareholders, none can own more than 95%

Liability of shareholders limited to capital contribution

Legal Representative will have power to bind company

Must appoint board with three principal and three alternate members

Must have statutory auditor

3.1.3 Limited liability company – Sociedad de Responsabilidad Limitada

Traditionally, limited liability companies were used to incorporate businesses with a reduced number of owners and fewer capital movements than a traditional corporation.

While they share many characteristics with the simplified corporation, the latter is gradually replacing the limited liability company, as it is easier to establish, has fewer formalities and a more favorable liability regime. This company structure is required in some sectors, for example certain insurance and reinsurance intermediaries and private security companies.

Key features of the limited liability company:

- Separate legal entity from its owners
- Minimum of two and maximum of 25 owners, known as partners
- Liability of partners limited to capital contribution PLUS partners jointly and severally liable for labor obligations to employees and income tax obligations of the company
- Legal Representative will have power to bind company
- No requirement for board of directors
Statutory auditor only required once assets or income exceed annual threshold\(^3\)

3.1.4 Branch of a foreign company (Sucursal)

A branch of a foreign company is not a separate legal entity under Colombian law. It is the same legal entity as, and considered an extension of, the foreign company. The branch must comply with all Colombian regulations, and liabilities incurred by the branch will flow to the foreign company abroad.

This structure is commonly used by oil, gas and mining businesses as it allows them to take advantage of a special exchange regime for the sector (see section 2.5). It is also popular with businesses involved in government procurement, as the branch is deemed to have the same experience as the foreign company when bidding for contracts.

As supplementary investment to the branch’s capital can be made by the principal office of the foreign company in cash from abroad, it is ideal for funding cost centers.

Key features of the branch of a foreign company:

- Same legal entity as foreign company
- Foreign company is the owner
- Liability flows back to foreign company
- Legal Representative in Colombia will have power to bind the branch
- Must have statutory auditor
- Only taxed on income in Colombia

\(^3\) The annual threshold for 2017 is COP 3,447,270,000 (USD 1,188,713) for gross assets and COP 2,068,362,000 (USD 713,228) for gross income
### 3.1.5 Differences between simplified corporation, traditional corporation and branch of a foreign company

<table>
<thead>
<tr>
<th></th>
<th><strong>Simplified corporation (SAS)</strong></th>
<th><strong>Traditional corporation (SA)</strong></th>
<th><strong>Branch of foreign company (Sucursal)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal entity</strong></td>
<td>A Colombian company and separate legal entity from its shareholders Can be converted to SA</td>
<td>A Colombian company and separate legal entity from its shareholders Can be converted to SAS</td>
<td>Same legal entity as foreign company Cannot be converted into a Colombian company</td>
</tr>
<tr>
<td><strong>Restrictions</strong></td>
<td>Cannot be used for banks, insurance companies or listed companies</td>
<td>Must be used for banks, insurance companies and listed companies</td>
<td>Cannot be used for banks, insurance companies or listed companies</td>
</tr>
<tr>
<td><strong>Number of owners</strong></td>
<td>One or more individuals or companies</td>
<td>Minimum of five, none can own 95% or more</td>
<td>Owned by foreign company</td>
</tr>
<tr>
<td><strong>Liability</strong></td>
<td>Shareholder liability limited in principle to capital contribution</td>
<td>Shareholder liability limited in principle to capital contribution</td>
<td>Foreign company liable for all assets and liabilities of branch</td>
</tr>
<tr>
<td><strong>Capital structure</strong></td>
<td>Consists of authorized, subscribed and paid-in capital. No restriction on the percentages of each Up to two years to pay subscribed</td>
<td>Consists of authorized, subscribed and paid-in capital with a restriction on holding 95% or more Half of authorized capital must be</td>
<td>Consists of assigned capital and supplementary investment Assigned capital must be fully paid-up and any increase requires board resolutions</td>
</tr>
<tr>
<td>Simplified corporation (SAS)</td>
<td>Traditional corporation (SA)</td>
<td>Branch of foreign company (Sucursal)</td>
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<tr>
<td>-----------------------------</td>
<td>------------------------------</td>
<td>-------------------------------------</td>
<td></td>
</tr>
<tr>
<td>shares</td>
<td>subscribed and 1/3 of value of each subscribed share must be paid on incorporation, with remaining 2/3 paid in one year</td>
<td>abroad and a bylaw amendment Increase in supplementary investment does not require such amendment and can be made in cash from abroad</td>
<td></td>
</tr>
<tr>
<td>Flexibility on different types of shares and attached economic or voting rights. Transfer of shares can be restricted for up to 10 years</td>
<td>Some flexibility on different types of shares and attached economic or voting rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Profits</td>
<td>Distribution approved by shareholder(s)</td>
<td>Must distribute 50% of profits unless 78% of shareholders agree not to (rises to 70% of profits once reserve exceeds subscribed capital) Distribution approved by foreign company</td>
<td></td>
</tr>
<tr>
<td>Reserves</td>
<td>Requirement to build up capital reserve is optional</td>
<td>10% of net profits must be allocated to a reserve until it equals at least 50% of the subscribed capital</td>
<td></td>
</tr>
<tr>
<td></td>
<td>10% of net profits must be allocated to a reserve until it equals at least 50% of the assigned capital</td>
<td>10% of net profits must be allocated to a reserve until it equals at least 50% of the assigned capital</td>
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<tr>
<td></td>
<td>Simple corporation (SAS)</td>
<td>Traditional corporation (SA)</td>
<td>Branch of foreign company (Sucursal)</td>
</tr>
<tr>
<td>----------------------</td>
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<td>-------------------------------------</td>
</tr>
<tr>
<td><strong>Board of Directors</strong></td>
<td>No board required</td>
<td>Must have a board with at least three principal members and three alternates</td>
<td>No board required</td>
</tr>
<tr>
<td><strong>Legal Representative</strong></td>
<td>May appoint a single manager with power to bind company</td>
<td>Must have legal representative, with alternate(s), with power to bind company</td>
<td>Must have legal representative, with alternate(s), with power to bind the branch</td>
</tr>
<tr>
<td><strong>Control</strong></td>
<td>Shareholder(s) can be represented in Colombia and can implement decisions quickly, with a good level of control where prior consent is required for acts by legal representative</td>
<td>Shareholders can delegate powers but all board decisions need personal participation of directors. Can be difficult if directors are not local, but is effective with a local board and management</td>
<td>Principal office abroad must make decisions on appointments or authorizations, which require legalized minutes to be sent from abroad. Implementation can be slow but provides a good level of control</td>
</tr>
<tr>
<td><strong>Statutory Auditor</strong></td>
<td>Only required once assets or income exceed</td>
<td>Must have a statutory auditor who is a qualified</td>
<td>Must have a statutory auditor who is a qualified</td>
</tr>
<tr>
<td>Incorporation</td>
<td>Simple corporation (SAS)</td>
<td>Traditional corporation (SA)</td>
<td>Branch of foreign company (Sucursal)</td>
</tr>
<tr>
<td>---------------</td>
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<td>------------------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>annual threshold(^4)</td>
<td>Colombian accountant</td>
<td>Colombian accountant</td>
<td></td>
</tr>
<tr>
<td><strong>Tax</strong></td>
<td>Taxed on global income</td>
<td>Taxed on global income</td>
<td>Taxed on income generated in Colombia</td>
</tr>
<tr>
<td>Shareholders in some countries can treat SAS as a pass-through entity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Government Procurement</strong></td>
<td>Experience of the direct shareholder may be used for first three years when bidding for government contracts but the financial information of the Colombian company must be used</td>
<td>Experience of the direct shareholder may be used for the first three years when bidding for government contracts but the financial information of the Colombian company must be used</td>
<td>All experience and financial information of the foreign company may be used by the branch when bidding for government contracts</td>
</tr>
</tbody>
</table>

\(^4\) The annual threshold for 2017 is COP 3,447,270,000 (USD 1,188,713) for gross assets and COP 2,068,362,000 (USD 713,228) for gross income
3.2. Parent companies and business groups

Colombian companies are required to register links with parent or controlling companies along with the existence of any business group.

A company is deemed to be controlled when its decision-making power is subject to the will of another entity. A business group exists among companies with a unified purpose and management and where one entity is subject to the control of another.

3.2.1 Registrations and reports

Where a situation of control or a business group exists, the controlling company must register a private document at the relevant Chamber of Commerce for each connected company. The document must contain details of the connected companies, their activities and the reason for their relationship. Failure to register may result in fines.

Where the controlling company is Colombian, the controlled companies must submit consolidated financial statements. Consolidated financial statements are not required where the controlling company is a foreign company.

Managers of companies within business groups are required to submit a report to their shareholders with details of the economic relationship and key operations carried out between the companies.

3.3. Contact us

For more details and to discuss which structure is most appropriate for your business, please contact Clare Montgomery:

Clare Montgomery
+57 1 634 1554
clare.montgomery@bakermckenzie.com
4 Mergers and Acquisitions

Mergers and acquisitions are often the preferred method for companies looking to enter the Colombian market for the first time, transform an existing business or exit the country.

This chapter gives an overview of typical provisions in Colombian purchase agreements, characteristics of mergers, asset sales and share sales, and some key regulatory issues regarding M&A.

While many features of Colombian M&A will be familiar to global businesses, we understand that the regulatory environment and business practices may not be. We advise clients on each stage of the deal process, from preparing for sale and due diligence, to negotiating agreements and coordinating closing across multiple jurisdictions.

4.1. Pre-contract negotiations

Under Colombian law, parties have a duty to act in good faith during pre-contractual negotiations. This includes providing accurate and sufficient information and being bound by confidentiality obligations regarding information obtained during negotiations.

It is common for companies to enter separate confidentiality agreements at the outset of negotiations before entering a more detailed memorandum of understanding or letter of intent as negotiations progress. Such documents frequently contain provisions regarding exclusivity, which are heavily negotiated.

4.2. Common features in Colombian purchase agreements

<table>
<thead>
<tr>
<th>Purchase Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjustments are common. All types are seen, including working capital and cash-free debt-free.</td>
</tr>
<tr>
<td>Earn-outs are not yet common. Use of escrow is being seen more often.</td>
</tr>
<tr>
<td>Conditions Precedent</td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>Covenants, Access</td>
</tr>
<tr>
<td>Representations and Warranties</td>
</tr>
<tr>
<td>Repetition of Representations and Warranties</td>
</tr>
<tr>
<td>Limitations on Liability</td>
</tr>
<tr>
<td>Reliance</td>
</tr>
<tr>
<td>Dispute Resolution</td>
</tr>
</tbody>
</table>

4.3. Mergers

Mergers in Colombia must be approved by shareholders (or partners) and can be implemented by the formation of a new company (which will absorb one or more dissolved, yet not liquidated corporations) or by an existing company absorbing another.

The surviving company assumes all assets, obligations and liabilities of the absorbed company or companies.
One point to note is that once the merger has been approved, the companies must: (a) publish basic information about the merger (for example, identification of participating companies, amount of assets and liabilities, and a summarized explanation of valuation mechanism) in a newspaper; and (b) notify all creditors of the merger.

The creditors have 30 business days to demand guarantees for payment of their credits. The merger process may be suspended until sufficient guarantees are presented or until payment has been made.

Antitrust clearance may be required, please see section 12.4 of this guide for further details. Governmental authorizations may be required for certain companies such as financial entities.

Where a company holds more than 90% of the shares of a simplified corporation, a streamlined merger process is available, whereby approval of the general assembly is not required.

4.4. Asset purchase

In Colombia, there are two ways to undertake a transfer of assets: (i) by means of the transfer of the individual assets, or (ii) by means of the transfer of a commercial establishment or ongoing concern\(^5\).

Asset purchases allow the buyer to cherry-pick the assets it requires and only assume the liabilities associated with those assets. While in principle there are no special voting majorities required to dispose of a business as an ongoing concern, the company’s bylaws often establish limitations or requirements in this regard.

If a business is sold as an ongoing concern, the sale is deemed to take place over the commercial establishment as a single economic unit, without requiring the parties to specify each of the assets. The seller

\(^5\) A commercial establishment (establecimiento de comercio) is a group of assets designated by an entity to form a separate commercial unit, which has been registered as such before the Chamber of Commerce.
must deliver financial statements for the commercial establishment, listing the liabilities, which must be certified by a public accountant.

When the business is transferred as an ongoing concern, notice of the sale must be published in newspapers. Creditors then have two months to oppose the sale and to demand guarantees or security for payment. The sale must then be registered before the Chamber of Commerce.

Antitrust clearance may be required, please see section 12.4 of this guide for further details. Unlike mergers, governmental authorization is generally not needed.

4.5. Purchase of shares

The acquisition of Colombian entities by share purchase may take place through the issuance of new shares or the purchase of existing shares. In both cases, the relevant shareholder approvals will need to be sought in compliance with the company’s bylaws.

As is normal in many jurisdictions, it is customary for the seller to give the purchaser representations and warranties associated with the company, its business, assets, liabilities and financial position.

Parties may also make payment and the transfer of shares conditional on certain events and may limit their responsibility and the amount to which they may be liable in the event of breach of contract.

Where new shares are issued, the capital contributions are made to the company and not to its shareholders or partners. Where existing shares are purchased, the payment is made to the selling shareholder.

Antitrust clearance may be required, please see section 12.4 of this guide for further details. Governmental authorizations may also be required for certain companies such as financial entities.

4.6. Public company takeover

There are regulations for listed companies which require a public tender offer to be addressed to shareholders in certain circumstances.
Whenever a person, directly or indirectly: (a) is to become a holder of 25% or more of the total outstanding voting shares of a company, with its shares listed in a securities exchange; or (b) already holds 25% or more of the outstanding voting shares of such a company and intends to increase its ownership by more than 5%, such person must acquire the shares through a public tender offer addressed to all shareholders, unless the current shareholders approve the acquisition unanimously.

If, as a result of a merger, any such owner meets the percentages described in the above paragraph, that owner must launch a public tender offer to acquire the same amount of shares acquired through the merger or spin-off, within three months following the date when the merger is completed, unless within that time frame, the acquirer has disposed of the shares exceeding the referred-to percentages.

4.7. Contact us

For further information or to discuss any aspect of the M&A process, please contact Juan Manuel de la Rosa or Juan Felipe Vera:

Juan Manuel de la Rosa  
+57 1 634 1560  
juanmanuel.delarosa@bakermckenzie.com

Juan Felipe Vera  
+57 1 634 1580  
juan.vera@bakermckenzie.com
5 Offshore Financing and Security Interests

Offshore financing is common in Colombia and often involves a range of security interests. This chapter examines the key principles which apply to foreign lending and associated security.

While there are generally no restrictions on the types of transactions or instruments which foreign lenders can enter, they must ensure that the reporting, regulatory and exchange regimes are complied with.

We advise lenders, borrowers, sponsors and agents on all aspects of structured finance, project finance and acquisition finance, as well as securitizations.

We have a strong track record across the world’s financial centers, including London, New York, Tokyo and Frankfurt. This allows us to provide solutions to financial, regulatory and tax issues which arise in complex transactions across multiple industries and jurisdictions.

5.1. Terms and conditions of loans

As a general rule, the terms of an offshore loan are freely negotiable and there are no restrictions on foreign companies lending to Colombian legal entities. There are also no restrictions on Colombian companies granting loans to foreign companies.

In both cases, lenders must ensure that any activities comply with the foreign exchange regime and are properly registered.

5.2. Types of security

Colombian law provides for a broad range of security interests which may be granted to secure a specific obligation or to secure present and future obligations of a debtor. The table below lists the most common types of security and some key features for lenders.
Mortgages

Available for real estate, aircrafts and some ships. Security over real estate is more expensive than in other jurisdictions and more costly than other types of security. This may affect the structuring of deals.

Personal property

Security interests can be created over most types of moveable asset and some economic rights. This includes items such as shares, conditional sales, account receivables and intellectual property rights.

Guarantee trusts

Can be created over real estate and personal property. May be preferred as trustees enforce the rights of creditors rather than the courts.

Account control

Creditors can take security interests over a bank account of the debtor in some situations. This is a recent creation. While it is being seen more often, it is generally limited to larger transactions.

5.2.1 Second-degree mortgages and pledges

Owners may mortgage or pledge an asset already mortgaged or pledged. The priority of creditors will be determined by the date of perfection of the security.

It is debatable whether such second-degree interests can be granted where the first creditor has taken possession of the asset as part of the first security. Generally, second priority interests are only granted over assets which remain in the control of the original owner.

5.3 Derivatives

Foreign investors that meet certain criteria may enter derivatives with Colombian entities. In cross-border transactions involving hedge
providers for interest rates or currency, Colombia is a jurisdiction which allows close-out netting (see section 2.7 for further details).

5.4. Taxes on offshore loans

5.4.1 Income tax

Interest on foreign loans paid by Colombian residents is considered Colombian-sourced income, and is subject to income tax withholding at a rate of 15%. These costs are generally borne by the debtor.

Lower withholding rates are available under double taxation treaties in force with Chile, Canada, Switzerland, Spain and others (see section 10.7 for further details).

Colombian borrowers are subject to thin capitalization rules that limit the amount of interest they can deduct for income tax purposes, with a threshold debt to equity ratio not to exceed 3:1 in order to deduct interest payments.

5.4.2 Registration tax

Any security interest over real estate is subject to registration tax, which contributes to making this a relatively expensive form of security. Most security over personal property is not subject to tax.

5.5. Regulatory requirements

Foreign loans are subject to reporting and regulatory requirements, including the foreign exchange regime (see Chapter 2 for details).

While foreign financial institutions are not restricted from providing facilities, they do require approval from the financial regulator before they may promote or advertise such services to Colombian entities.

5.6. Priority and preference for payment

There is a well-established priority regime in Colombia which ranks secured creditors highly. In general, only pension liabilities rank above liabilities covered by a security interest.
In the cases of liquidation or collection out of insolvency, this process is generally straightforward.

Where companies are negotiating voluntary arrangements with creditors (reorganization agreement), the position is complicated by regulations which restrict creditors’ access to assets which are essential for the company to carry out its business. This may limit the claim of secured creditors to a preferential claim under the agreement.

5.7. Choice of law and forum

Generally, where the main obligations (ie, repayment) under foreign loans are to be performed abroad, the parties are free to agree that the agreement will be governed by foreign law. The parties are also free to agree that any disputes may be heard in foreign jurisdictions.

This is not the case with securities agreements where the security is located in Colombia. These agreements will be governed by Colombian law and be subject to the jurisdiction of Colombian courts.

Even where the parties to foreign loans agree to submit to a foreign jurisdiction, if a party brings a claim before the Colombian courts, the Colombian courts will assume jurisdiction.

The risk then exists that the Colombian courts may find a clause submitting the agreement to foreign law unenforceable and decide any dispute according to Colombian law.

The parties can mitigate this risk by referring disputes to international arbitration. Where an arbitration clause is properly drafted, parties will be restricted from bringing claims before the Colombian courts.

5.8. Remedies and enforcement

Colombian law has traditionally held that judicial proceedings are needed to enforce a security interest.

However, a secured creditor may now take direct enforcement action by taking ownership of the assets in certain situations or by disposing
of the assets directly. In practice, this option will probably only be realistic where the creditor has control of the collateral, for example where it holds share certificates.

It is worth noting that Colombian courts will generally enforce foreign judgments in relation to assets held in Colombia as part of cross-border transactions.

5.9. Contact us

For further information or to discuss any financing arrangements, please contact Ricardo Trejos:

Ricardo Trejos
+57 1 634 1549
ricardo.trejos@bakermckenzie.com
6 Dealer Legislation

Engaging dealers is an important mechanism for foreign businesses who wish to participate in the Colombian market without establishing a legal presence. This chapter outlines the risks and obligations in relation to different types of dealer.

In general, Colombian entities acting as dealers will either be acting as distributors or commercial agents. As in many countries, Colombian law gives special protections to entities acting as commercial agents.

We help clients establish and restructure distribution systems, negotiate agreements and terminate existing contracts, including under agency, franchising and concession models.

We understand the need to develop solutions which fit your business and are confident dealing with complex cross-border arrangements.

6.1. Distributor or commercial agent?

Commercial factors often dictate the type of dealer a business will require, from simple buy-sell distributors who take the risk of resale, to agents developing business contacts on behalf of the principal.

Whether such a dealer is protected by commercial agents legislation will then depend on the activities of the dealer and the nature of the relationship between the parties. This will depend on the factual circumstances and will be decided according to Colombian law.

In legal terms, an entity will be acting as a commercial agent when it: (i) is acting on behalf of the principal, (ii) is acting independently, (iii) has a permanent relationship with the principal, and (iv) its activities promote the principal’s products or services.

In practice, the first of these limbs is often the most important. The more the dealer is seen to be acting on behalf of the principal and the greater the level of control the principal exerts, the more likely the dealer will be a commercial agent (as opposed to a distributor).
It is likely that dealers acting on a commission basis who do not take title to goods or the risk of nonpayment, will be acting as commercial agents. Conversely, dealers who buy goods and resell them at their own risk are unlikely to be protected as commercial agents.

While the above definitions are generally accepted, real-life business relationships are often more complicated and careful consideration of individual circumstances may be needed when determining whether agreements are likely to fall under commercial agents legislation.

6.2. Key features of agreements with dealers

Some of the key features of distribution and commercial agency contracts under Colombian law are discussed below, including termination payments, exclusivity, non-compete provisions and choice of jurisdiction for resolving disputes.

6.2.1 Agreement in writing

While all dealer arrangements should be properly drafted in a written contract in order to minimize risk and reflect the true relationship between parties, this is especially important with commercial agents.

By law, commercial agency agreements must be written and registered with the Chamber of Commerce. Failure to register will prevent the enforcement of the agreement against third parties, but will not affect the enforceability of the agreement between the parties.

Moreover, Colombian law can imply the existence of a de facto or unwritten commercial agency agreement. The terms implied by law are generally less favorable to principals than those negotiated freely between parties. By entering a written agreement, principals can avoid the uncertainty of being subject to such a de facto agreement.

6.3. Termination benefits

Principals are under an obligation to pay termination benefits under all commercial agency agreements. These consist of a termination payment and an equitable termination indemnity.
6.3.1 Termination payment

In general, a principal will be required to make a termination payment upon the termination of the commercial agency agreement, regardless of the reasons for termination. See section 6.3.3 below for situations in which this payment can be waived.

The amount of this payment is equal to the average monthly commission or profit received by the commercial agent over the last three years of the relationship, multiplied by the number of years during which the agreement was in effect.

If the agreement was in effect for less than three years, the monthly average is calculated on all commissions and profits the agent received in connection with the commercial agency agreement.

6.3.2 Equitable termination indemnity

The principal must make a payment known as an “equitable termination indemnity” if: (a) the principal terminates the commercial agency agreement without just cause; or (b) the commercial agent terminates the commercial agency agreement with just cause.

This payment is intended to compensate the commercial agent for developing a market for the principal’s products. The amount of the payment is determined by independent experts on the basis of the duration, volume and importance of the local sales promoted by the commercial agent.

This payment is one of the main causes of concern for principals under commercial agency agreements because of the uncertainty that it entails, as it is not easy to accurately predict the size of the payment.

6.3.3 Possibility of waiving termination benefits

It is generally accepted that the parties can waive the termination payment at any time, provided that the agreement was freely negotiated and validly executed by the parties in good faith, and that the waiver was not imposed on the agent by the principal.
It is also possible for the principal to pay the termination payment in advance throughout the term of the agreement.

It is unlikely that the parties can waive the equitable termination indemnity, as both courts and arbitration tribunals generally reject this possibility. However, the payment only has to be made when the termination is not justified, and the parties can mitigate this risk by adding adequate termination provisions in the written agreement.

6.4. Exclusivity

Unless the written agreement expressly provides otherwise, a principal may not appoint more than one commercial agent in a specified geographical area for the same products or type of activity.

Conversely, dealers acting as distributors will only enjoy exclusivity if it is expressly granted in the written agreement.

6.5. Non-compete covenants

Non-compete clauses are commonly used in dealer arrangements in Colombia. To be enforceable such clauses must be reasonable and cannot extend beyond the duration of the agreement.

Non-compete clauses must be drafted carefully to ensure they do not breach antitrust/competition law. In general, this will depend on the reasonableness of the clause and factors such as the size of the market, the number of participants in the market, and the activities of the parties in that market.

In the absence of such a restriction, the dealer may promote competitive products.

6.6. Commission or compensation for commercial agents

Dealers acting as commercial agents are entitled to commission for all sales they make within the relevant territory. They may also receive compensation for sales not completed due to the principal’s fault.
Commercial agents may also be entitled to payment when the principal sells products directly to customers within the dealer’s territory. It may be possible for principals to avoid this payment by expressly providing for a non-exclusive appointment.

6.7. Choice of law

Businesses with established dealership structures in other jurisdictions often have a preferred form of written agreement and forum for resolving any disputes with dealers.

While there is a general rule that commercial agency agreements performed within Colombia must be governed by Colombian law, we frequently advice clients on effective methods for selecting their jurisdiction of choice to govern dealer arrangements in Colombia.

6.8. Statute of limitations

Actions deriving from a commercial agency agreement must be brought within five years, which generally runs from the event giving rise to the claim. This period is 10 years for distribution agreements.

6.9. Contact us

To discuss any proposed or existing dealer arrangements, please contact Alejandro Mesa:

Alejandro Mesa
+57 1 634 1551
alejandro.mesa@bakermckenzie.com
7  Government Procurement

Government contracts play a major role in the Colombian economy and continue to be a popular target for foreign investment. This chapter explains the process for awarding contracts, key features for foreign bidders and the dispute resolution process.

The Colombian procurement process resembles the regimes found in the USA and Europe. Government entities run tenders where bidders are judged against published criteria, with the whole process subject to principles of transparency and objective selection.

The current government has set ambitious targets for infrastructure development, with a focus on PPP projects in the transport sector. With a rule that foreigners must be treated the same as Colombian bidders, this makes procurement a key area for inward investment.

We advise clients on every stage of the procurement process, from analyzing RFP documents and translation services, to drafting documents required for bids and negotiating with public bodies.

7.1. Participation by foreign entities

Foreign entities may provide goods and services to government bodies and are subject to the same bidding rules as Colombian companies.

There are no restrictions on foreign companies entering bids. If they win contracts which involve carrying out permanent activities in Colombia, they must establish a legal presence. This may be a new company or a registered branch of the foreign company in Colombia.

It is also very common for foreign entities to partner with Colombian companies and submit a joint bid. See section 7.6 for further details.

Where a newly-formed company is used to enter a bid, during the first three years of its operation, it can take advantage of the experience (though not financial capacity) of its shareholders.

Branches of foreign companies registered in Colombia are the same legal entity as the principal office overseas and so can take advantage
of all relevant technical, financial and operational experience when submitting bids. As such, they are a common vehicle for foreign companies whose focus is winning procurement contracts.

There is a central register where Colombian entities and branches of foreign companies are generally required to register to bid in public procurement. Foreign entities with no local branch cannot register and will have to submit additional information each time they enter a bid.

While foreign bidders do not receive adverse treatment per se, the selection criteria in competitive bidding may allocate points for supplying goods with local components or local services.

7.2. Entities subject to government procurement laws

Generally, all government-owned entities are subject to procurement laws and must award contracts using one of the prescribed processes.

Government-owned entity is defined broadly and includes national and regional departments, along with related agencies. It can also include bodies which are controlled by government departments.

Exemptions exist for some sectors, such as public utilities, and for certain government-owned entities (eg, Ecopetrol, the national oil company, which is subject to the private contractual regime).

Under the private contractual regime, companies are free to determine their own process for awarding contracts, but must still abide by the overriding principles of transparency and objective selection.

7.3. Forms of written agreement

As a general rule, while procurement laws establish the processes which must be followed to award contracts, the terms of agreements can be determined by the individual government-owned entity.

In practice, the government has standard contracts which are included in requests for proposals. Save for high-value or complex projects, it is uncommon for bidders to negotiate changes to these standard terms.
In addition, contracts for civil works (construction), concessions (including PPP), public trusts and public credit arrangements must include certain terms by law.

7.4. Indemnity clause

In nearly all cases, contracts awarded under public procurement will contain an indemnity clause whereby a contractor is obliged to keep the public body harmless from any third-party claims arising from the contractor’s actions, or from its subcontractors or agents.

7.5. Procurement procedures

Public entities must use one of the five procedures set out below to carry out procurement. All procedures must comply with the principles of transparency and objective selection.

7.5.1 Public bid

This is the default process for awarding contracts. Once bidders meet the minimum qualification criteria (including experience, financial requirements and personnel), the overriding awarding factor will usually be a mix of price and technical qualities.

7.5.2 Abbreviated selection

Similar to a public bid, this is a shorter and simpler process used for lower value contracts. It is also used to award contracts for the procurement of standard goods, such as stationery. With contracts for standard goods or services, price is usually the key awarding factor.

7.5.3 Merit-based qualification

This is used to select entities who will provide consulting services to public bodies. These are awarded according to experience and academic qualifications rather than lowest price criteria.

7.5.4 Direct contracting

Public bodies can purchase goods or services without using competitive bidding in specific circumstances, such as when: (i) there
is an urgent need for the goods or services, (ii) the value of the agreement is low, or (iii) acquiring assets that are only provided by one entity in the market or for national security purposes.

In practice, public bodies will generally use some form of competitive process during direct contracting. In addition, the award must reflect market conditions, although no plural bidders are required.

7.5.5 *De minimis* contracting

This is a very simple procedure used to award low-value contracts.

7.6. Using Joint Ventures to submit bids

Bidders may form joint ventures to submit bids using one of the three structures described below. Joint ventures, often with Colombian entities, are a very common form of participation by foreign investors. A bidder cannot also bid individually if he is part of a joint bid.

7.6.1 Temporary union

This is an unincorporated joint venture through which two or more bidders may submit a single bid. Subject to the exception below, members are jointly and severally liable for contractual obligations.

Joint liability can be effectively avoided, provided that the members clearly establish and inform the public body who will comply with each of the obligations when submitting their bid. Any sanctions or fines may then be imposed and enforced only against the member who breached the relevant obligation under the agreement.

7.6.2 Consortium

This is an unincorporated joint venture through which two or more bidders may submit a single bid. The members will be jointly and severally liable for obligations under the contract, regardless of who in practice agreed to fulfil each of the obligations.
7.6.3 Promise for future partnership

This is originally a non-incorporated joint venture used to submit a single bid, which will be obliged to incorporate a vehicle for the execution of the agreement if it is awarded to its members.

7.7. Remedies available to private parties

In case of a breach of contract by a public body, the contractor will normally have a contractual action in the Colombian administrative courts. The only remedy generally available will be damages.

The courts also have powers to declare contracts null which were awarded unlawfully. The contractor will be entitled to payment for works already performed under the contracts declared null.

7.8. Disputes forum

Generally, claims arising from contracts subject to procurement laws will be held before a specialist Colombian court. However, before claims reach court, the contractor will have the chance to challenge the government’s decisions directly before the government-entity.

The parties may also agree on national arbitration. This is mostly restricted to high-value or complex projects, such as concession or PPP contracts.

It is rare for contracts to contain an arbitration clause which submits disputes to foreign jurisdictions. Such a clause may be seen if the contractor is a foreign entity, such as in public credit arrangements.

7.9. Contact us

For more information or to discuss any aspect of public procurement, please contact Alejandro Mesa:

Alejandro Mesa
+57 1 634 1551
alejandro.mesa@bakermckenzie.com
8 Oil and Gas

Despite global pressures due to low prices, Colombia remains an attractive target for oil companies. This chapter examines the legal framework and key features regarding exploration and production.

Colombia has an independent regulator which operates a concession regime where companies bid for E&P contracts. Unlike many Latin American countries, private entities compete with the national oil company Ecopetrol, which does not have regulatory powers.

Coupled with a liberalized regulatory regime and special measures to encourage foreign companies, this has seen Colombia become an important oil exporter. It also has an established regime for exploiting unconventional hydrocarbons and has begun exporting natural gas.

We advise companies on the full range of transactions in the oil and gas sector, from negotiating contracts (such as farms-in farms-out, joint operating agreements, overriding royalty interests, and carries) to cross-border M&A, featuring all types of investors, including private equity. We also assist with services contracts and daily operations.

8.1. Legal framework

As a general rule, the Colombian state owns all subsurface and natural non-renewable resources. An independent public regulator (Agencia Nacional de Hidrocarburos) runs competitive tenders where companies can bid for contracts to exploit these resources.

E&P contracts grant companies the exclusive right to explore a defined area and exploit conventional and unconventional hydrocarbons. The company is free to dispose of any such resources when they become the property of the company at the wellhead.

Surface access rights can be acquired by purchasing the land or by having rights of way declared. Where private negotiations with land owners are unsuccessful, expropriation and the compulsory imposition of easements or right of ways are available under Colombian law.
Foreign companies must establish a Colombian branch domiciled in Bogota to enter E&P contracts. All such contracts will be governed by Colombian law and be subject to the jurisdiction of Colombian courts.

8.1.1 Participation of foreign companies

There are no restrictions on foreign companies participating in the oil and gas sector, whether they are bidding for E&P contracts or engaging in the acquisition, sale or financing of existing operations.

Furthermore, registered branches of foreign companies in Colombia can take advantage of a special exchange regime which allows them to use foreign currency for transactions (see section 2.5 for details).

8.2. Agencia Nacional de Hidrocarburos or ANH

The ANH is the administrator and regulator of the country’s oil and gas resources. It awards and negotiates E&P contracts and regulates activities under them.

8.3. Process for awarding E&P contracts

The ANH runs open competitions to award E&P contracts over predefined areas, known as blocks. Bidders must satisfy legal, technical, financial and operational criteria to qualify, including having experience in E&P activities.

Bidders who qualify then compete for a percentage share of the relevant block. The key deciding factors in awarding contracts will generally be the percentage share of production the bidder offers the government (represented by the ANH) (see section 8.5.2 for details of other payments) and the minimum exploration commitments.

8.4. Environmental license

Companies who have been granted an E&P contract will not be able to commence activities until they have been granted an environmental license. An application must be made to the National Environmental Licensing Agency – see Chapter 13 of this guide for further details.
8.5. Key provisions in E&P contracts

The sections below outline some of the key terms of E&P contracts, including the term, payment mechanisms and assignment provisions.

8.5.1 Contract area

The ANH is responsible for defining the areas covered by E&P contracts. Contract areas will be subject to relinquishment obligations.

8.5.2 Payments

The following table summarizes the key payments which contractors must make to the government:

<table>
<thead>
<tr>
<th>Payments</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surface fee</td>
<td>Payable from date of contract until start of production. Rates are set in USD per Ha and vary according to the size of area, duration of phase and whether activities are onshore or offshore.</td>
</tr>
<tr>
<td>Royalties</td>
<td>A sliding scale runs from 8% of production for fields producing up to 5,000 bbl/d, to a maximum of 25% for those producing 600,000-plus bbl/d. Discounts are available for natural gas and heavy oil.</td>
</tr>
<tr>
<td>High prices compensation</td>
<td>There is a fixed rate in the contract that can vary with high prices and level of aggregated production.</td>
</tr>
<tr>
<td>Share of production</td>
<td>There is also a rate proposed by the contractor in its bid for contracts which commonly ranges from 5-10% of production (calculated after royalties).</td>
</tr>
<tr>
<td>Extension period share</td>
<td>If an extension period is agreed, the contractor must pay a further share of production (calculated after royalties and initial share of production).</td>
</tr>
</tbody>
</table>
8.5.3 Duration

Contracts for **conventional** hydrocarbons have an exploration period of six years, which is divided into sub-phases. The exploitation period is 24 years from the declaration of commerciality of a field and can be extended throughout the economic life of the reservoir.

Contracts for **unconventional** hydrocarbons have an exploration period of nine years, which can be extended to allow the termination of activities. There is also an evaluation period of up to two years. The exploitation period is 30 years from the declaration of commerciality. This may be extended for successive terms of 10 years.

8.6. Contact us

For further information or to discuss any investment in the oil and gas sector, please contact Alejandro Mesa:

Alejandro Mesa
+57 1 634 1551
alejandro.mesa@bakermckenzie.com
9 Mining

Colombia has significant mineral resources and, despite the global downturn in the mining sector, it remains an exporter of products such as coal, nickel, emeralds and precious metals.

This chapter examines the regulation of mining activities in the country and the key features for foreign companies. As a general rule, there are no restrictions on overseas investment in mining and foreign companies are extremely active in this area.

We regularly advise clients on establishing new projects, acquiring existing operations and realizing their investments when terminating concession agreements.

9.1. General framework

The state owns all subsurface and natural nonrenewable resources. A public regulator, the National Mining Agency ("ANM"), awards concession contracts to explore and exploit minerals, which are generally awarded on a first-come first-served basis.

Prospecting is free and does not require a concession or any kind of permit. Companies who have identified potential sites are free to propose mining operations to the ANM. Where such proposals comply with the relevant checklist, the ANM is obliged to grant a concession.

The concession contract covers all activities from exploration and construction to exploitation, granting the contractor the right to produce specific minerals in a given area. Minerals become the property of the contractor as soon as they are extracted.

Once a concession has been granted, contractors will need to negotiate access rights to the area with the relevant land owner(s). The contractor will then need to apply for an environmental license before beginning construction or exploitation.
9.2. Restricted areas

The ANM designates areas of national importance and concessions in these areas are exempted from the first-come first-served regime.

These areas commonly relate to mineral reserves which are important for the development of the country, national security zones and sites protected due to their environmental or cultural significance.

Where reserves are deemed to be of national importance, the ANM grants concessions pursuant to public bidding processes, with specific technical, capacity, financial and environmental requirements.

9.3. Obtaining a concession agreement

Companies can obtain a concession agreement by submitting a new proposal to ANM or by purchasing an existing operation. Foreign companies frequently acquire concessions through M&A activity.

Proposals for new concession agreements are filed electronically. The proposal grants the applicant a preferential right over the area pending the award of mining rights. The mining rights are only formally acquired once the agreement is executed and registered.

9.4. Environmental license

Contractors must have an environmental license before they can begin exploiting any minerals. Licenses will be granted by the National Authority of Environmental Licenses for major projects or the equivalent regional body for small-scale projects.

Contractors must submit an Environmental Impact Assessment to support their application.

The environmental license granted for mining projects authorizes all relevant activities (including construction, assembly, exploitation, benefit and internal transportation of the minerals).
Other permits related to the use of specific natural resources such as (i) water, (ii) air, and (iii) forests may be required. See Chapter 13 of this guide for further detail on environmental licenses and permits.

9.5. Rights and obligations under concession agreements

Concession agreements are based on a non-negotiable template issued by the ANM. The term of the agreement is divided into three stages: (i) exploration; (ii) construction and assembly; and (iii) exploitation.

Different obligations and regulatory regimes apply during each stage. The table below summarizes key provisions:

<table>
<thead>
<tr>
<th>Duration</th>
<th>Initial term of 30 years with an extension period of 30 years. Contractors can apply for a new agreement on expiry, giving a maximum term of 120 years for a given area.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surface fee</td>
<td>Payable during exploration and construction stages. Rates are determined according to the size of area and length of operation. Not payable in relation to areas where exploitation has begun.</td>
</tr>
<tr>
<td>Environmental license</td>
<td>Not needed during exploration. Contractor must apply for license before starting construction stage and must have license in place before starting exploitation. Single global license for all activities.</td>
</tr>
<tr>
<td>Royalties</td>
<td>Must be paid to ANM in relation to any mineral exploited. Rates are determined according to the base price of the mineral and the size of production. Rates and base prices are set quarterly by the national government.</td>
</tr>
<tr>
<td>Assignment</td>
<td>Contractors may assign concession agreements and environmental licenses. ANM must accept the assignments unless the contractor is in default.</td>
</tr>
</tbody>
</table>
### 9.6. Surface rights

Access rights can be acquired by purchasing the land or by having rights of way declared. Where private negotiations with the land owner are unsuccessful, expropriation and the compulsory imposition of easements or right of ways are available under Colombian law.

### 9.7. Contact us

For further information about the mining sector or to discuss any investment, please contact Alejandro Mesa:

Alejandro Mesa  
+57 1 634 1551  
alejandro.mesa@bakermckenzie.com
10 Tax

The Colombian tax system underwent large-scale reform in 2016 as part of efforts to lower fiscal debt and improve credit ratings. This chapter outlines the new tax regime for entities and individuals.

Companies and individuals may be able to benefit from a range of exemptions, deductions and special regimes which are not set out in detail here.

We help clients design, implement and defend tax strategies, whether as part of daily operations, or when structuring cross-border transactions involving complex financing arrangements, private equity and private wealth.

10.1. Tax reform

The reform in force as of 2017, includes the following key changes:

- Corporate tax: lower rate, but new tax on dividends and surcharge
- Accounting standards: IFRS adopted
- Personal tax: new system with rates set by types of income
- Rationalization: taxes including CREE and Wealth Tax removed

10.2. Corporate taxes

The table below shows corporate rates until 2019. The surcharge is payable when annual profits exceed COP 800 million (USD 275,862).

<table>
<thead>
<tr>
<th>Year</th>
<th>Income tax</th>
<th>Surcharge</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>34%</td>
<td>6%</td>
<td>40%</td>
</tr>
<tr>
<td>2018</td>
<td>33%</td>
<td>4%</td>
<td>37%</td>
</tr>
</tbody>
</table>
The taxable base is the greater of actual net income or presumptive income. Presumptive income is based on the value of assets, so low income may not mean lower tax liabilities for asset-held businesses.

Proportionate, necessary expenses which are connected to the income producing activity are deductible. Special rules should be observed for foreign expenses, interest bearing loans and losses.

Businesses in free trade zones may qualify for a flat 20% rate where they meet thresholds for investment and creating jobs. Some sectors, including hotels and ecotourism, are exempt from income tax.

### 10.3. Dividends tax

The reform introduced a new tax on dividends of 5% for dividends paid to non-resident individuals and entities out of taxed profits at the corporate level and of 35% for dividends paid out of untaxed profits at the corporate level plus an additional 5% tax on the distributed dividend net of the 35% initial tax.

### 10.4. Individual taxes

Individual income tax rates are determined according to income baskets and residence status. Losses can only be offset against the same type of income. The rates for each type of income are as follows:

<table>
<thead>
<tr>
<th>Labor</th>
<th>Pensions</th>
<th>Capital</th>
<th>Non-labor</th>
<th>Dividends</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-33% for residents</td>
<td>0-33% for residents</td>
<td>0-35% for residents</td>
<td>0-35% for residents</td>
<td>0-35% for residents</td>
</tr>
</tbody>
</table>

6 The rate is 0-10% for dividends paid out of taxed profits at the corporate level, and 35% for those paid out of untaxed profits or from a foreign entity.
10.5. VAT

VAT applies at a rate of 19% on:

- The import or sale of tangible goods ⁸
- The assignment of rights on intangible assets solely associated with industrial property
- The provision of services on national territory or from abroad ⁹
- The circulation, sale or operation of games of chance

10.6. Withholding regime

Colombia has a withholding tax system where a percentage of payments to taxpayers is withheld. Such payments are a prepayment of the final tax liability and will be credited in tax returns.

Income tax withholding rates of 15% apply to payments for foreign services including: general, management and administration services; technical services and assistance; consulting services; and interest on foreign loans.

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The rate is 5% for dividends paid to non-residents out of taxed profits at the corporate level. Where dividends are paid out of untaxed profits at the corporate level, the rate is 35% plus an additional 5% tax on the distributed dividend (net of the 35% initial tax).

Goods including certain foods, medicines, oil, gas and electricity are exempt, as are healthcare and transport services.

When the consumer of the service is a Colombian resident.
10.7. Double taxation treaties

Companies and individuals may benefit from reduced tax rates under double taxation treaties in force with the following countries:

<table>
<thead>
<tr>
<th>Service</th>
<th>Mexico</th>
<th>Spain</th>
<th>Chile</th>
<th>Canada</th>
<th>Switzerland</th>
<th>Korea</th>
<th>India</th>
<th>Portugal</th>
<th>Czech Republic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business profits</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Dividends</td>
<td>0% or 33%</td>
<td>0%, 5% or 33%</td>
<td>0%, 7% or 33%</td>
<td>5% or 15%</td>
<td>0%</td>
<td>0%, 5% or 15%</td>
<td>0% or 15%</td>
<td>0%, 10% or 33%</td>
<td>5%, 15% or 25%</td>
</tr>
<tr>
<td>Interests</td>
<td>5% or 10%</td>
<td>10% or 0%</td>
<td>5 or 15%</td>
<td>10%</td>
<td>0% or 10%</td>
<td>0% or 10%</td>
<td>0% or 10%</td>
<td>0% or 10%</td>
<td>0% or 10%</td>
</tr>
<tr>
<td>Royalties</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
</tr>
</tbody>
</table>

10.8. Anti-avoidance rules

Special rules designed to prevent tax avoidance exist in relation to:

- Tax havens and preferential regimes
- Ultimate beneficial owners and common reporting standards
- Controlled foreign corporations (CFCs)
- Tax abuse
- Omitted assets or inexistent debts

10.9. Transfer pricing

The Colombian transfer pricing regime adopts the OECD model. This requires taxpayers who do business with non-domiciled related
parties, to determine their income based on a profit margin comparable to the one obtained in deals with unrelated parties.

The following methods are used to determine profits: (i) comparable uncontrolled price (CUP); (ii) resale price; (iii) cost plus; (iv) profit split; (v) residual profit split and (vi) transactional net margin.

Transfer pricing obligations are likely to affect: subsidiaries; branches of foreign companies; agencies; permanent establishments; transactions between two parties sharing control or capital; or transactions between economic associates held through a third party.

10.10. Tax litigation

Tax litigation involving less than COP 73,771,700 (USD 25,438) is heard by a single administrative judge. For sums greater than this, the claim is heard by an administrative tribunal.

Where claims are brought before a judge, the decision can be appealed to the tribunal. Decisions made by the tribunal can be appealed to the Supreme Administrative Court. The jurisdiction of tribunals depends on the place in which the taxpayer filed the return.

Before filing a tax lawsuit before the courts, it is compulsory to discuss the case with the tax authorities that made the assessment.

10.11. Other tax liabilities

Other taxes at a national level include those in relation to capital gains, customs duties and financial transactions. Taxes at a municipal or regional level include those in relation to property ownership, property transactions, and industry and commerce.
10.12. Contact us

For further information or to discuss any potential tax liabilities, please contact Ciro Meza or Rodrigo Castillo Cottin:

Ciro Meza  
+57 1 634 1557  
ciro.meza@bakermckenzie.com

Rodrigo Castillo Cottin  
+57 1 634 1544  
rodrigo.castillo@bakermckenzie.com
11 The Employment Regime

Colombian employment law protects workers by providing rights such as minimum pay, welfare benefits and protection from at-will termination. This chapter outlines the key obligations on employers.

Labor costs in Colombia are similar to those across Latin America, which are generally higher than in countries like USA and Canada.

We help clients comply with all employment regulations, from hiring staff and drafting compensation packages to major workforce changes as a result of corporate restructuring and M&A.

11.1. Employment agreements

Most staff will be regarded as employees under the law and will be entitled to related benefits. This is because employment agreements are defined widely and include nearly all situations where individuals provide personal services, in accordance with orders, for payment.

It is possible to engage individuals under services agreements, but only where services are provided independently on a day-to-day basis.

Employment agreements can be for the duration of a specific job, for a fixed period or for an indefinite duration. There is no principle of employment at-will and employers will have to make severance payments for termination without cause.

Certain workers are protected from dismissal, including those who are pregnant, with newborns, disabled, sick, nearing their pension, with labor harassment complaints and union representatives.

Union representation is not common, other than in the oil and gas, and banking sectors. However, the government is encouraging greater representation as a result of trade agreements with USA and Canada.
11.2. Obligations on employers

Anyone engaged under an employment agreement in Colombia will be entitled to a range of benefits from their employer.

The table below summarizes the main benefits. Further detail is given below the table.

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Salary</strong></td>
<td>Minimum monthly salary is updated annually. Set at COP 737,717 for 2017 (USD 254)</td>
</tr>
<tr>
<td><strong>Vacations</strong></td>
<td>15 days paid holiday per year</td>
</tr>
<tr>
<td><strong>Social security</strong></td>
<td>Employer must make contributions on behalf of the employee directly to the state social security system</td>
</tr>
<tr>
<td><strong>Social benefits</strong></td>
<td>Mandatory benefits paid to employees under an “ordinary salary” structure. These are roughly equivalent to two months’ extra pay per year</td>
</tr>
<tr>
<td><strong>Termination payments</strong></td>
<td>All unpaid benefits (salary, vacation, etc.) must be paid on any termination. For termination without cause, a severance payment must also be made</td>
</tr>
<tr>
<td><strong>Payroll taxes</strong></td>
<td>Employers must make contributions equal to 9% of monthly gross payroll to the family compensation bureau, family welfare and apprenticeship schemes</td>
</tr>
</tbody>
</table>

11.2.1 Salary

In general, salary includes everything the worker receives in money or in kind, as direct compensation for his or her services. This does not include social benefits and it may be possible to exclude certain payments (including occasional bonuses).

There are no set salary levels other than the minimum monthly salary. Employees doing equal work must receive equal pay. Working hours and pay are regulated in relation to normal working days, nighttime working, overtime, Sundays and public holidays.
Salaries can be paid in two ways. Under the “ordinary salary” structure, monthly pay and mandatory benefits are paid separately. Under the “integral salary” structure, mandatory benefits are included, *pro rata* in the monthly salary payments.

Integral salary only applies to employees who earn more than 13 minimum legal salaries per month. It pays, in advance, all social benefits, allowances, overtime work, and similar benefits. It does not include social security contributions and vacations.

### 11.2.2 Vacations

Vacation days are equivalent to 15 working days of paid rest for each year of service. Employees may agree to monetary compensation for up to half of their accrued vacation period.

### 11.2.3 Social benefits

These are paid to employees who receive an ordinary salary. They are designed to provide a profit share (services bonus) and unemployment aid payments. In practice, this means employers pay the equivalent of approximately two extra monthly salary payments per year.

For employees with lower income, they also assist with transport costs and the purchase of work clothes.

Where employees receive an integral salary, these benefits are deemed to already be included in the monthly salary.

### 11.2.4 Social security system

Employers must register all employees with the social security system. This goes towards providing a pension and assists employees in relation to sickness, maternity, work accidents and invalidity.

Where employees are absent through sickness, employers pay sickness allowances instead of salaries, and can claim these payments back through the social security system.
Monthly contributions must be made to three systems as set out in the table below. Employers are responsible for payments.

<table>
<thead>
<tr>
<th>Social Security System</th>
<th>Contributions (% of salary)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Employee</td>
</tr>
<tr>
<td>Pension</td>
<td>4%</td>
</tr>
<tr>
<td>Healthcare*</td>
<td>4%</td>
</tr>
<tr>
<td>Labor risks</td>
<td></td>
</tr>
</tbody>
</table>

* Employer contribution only for employees who earn more than 10 minimum monthly salaries.

11.2.5 Termination payments

Employers must pay employees all outstanding labor benefits and salary immediately upon termination of their services.

This includes: pending salaries, non-deposited unemployment aid, interest in unemployment aid, services bonuses and unused vacation. Employees earning an integral salary would be entitled only to pending salaries and unused vacation.

If an employee is dismissed without cause, the employee is entitled to severance pay. The amount of the severance pay depends on the type of employment agreement, salary level and seniority.

Where the employer does not make the appropriate salary and social benefits payments upon termination, the size of payment can be increased with every day of delay.

11.2.6 Payroll taxes

For employees who earn 10 or more minimum monthly salaries, employers must pay taxes to the Family Compensation Bureau, the Institute of Family Welfare and the National Apprenticeship Institute, that are equivalent in aggregate to 9% of monthly gross payroll.
Employers must also register all employees with the family compensation bureau.

11.2.7 Relocation expenses

The employer must pay reasonable relocation expenses. This may also apply to foreign employees holding a visa.

11.3 Health and safety

Employers are required to supply and maintain safe installations and equipment, and to implement a health and industrial safety program.

The previous health and industrial safety standards will be replaced by a new regime which is being phased in from June 2017. The new system aims to ensure continuous improvement of internal policies.

11.4 Visas and temporary permits

Visas are generally required for foreigners wishing to carry out business in Colombia. The most common types are the TP-4, TP-15 and NE visas, and the PIP-6 permit.

11.4.1 TP-4 Visa (Work Visa)

The TP-4 visa is a multiple-entry visa issued for a maximum of three years. It is used primarily by management, technical and administrative personnel employed by a local entity in Colombia.

11.4.2 TP-15 Visa (Mercosur Visa)

The TP-15 visa is a multiple-entry visa issued for a maximum of two years. It is a temporary resident visa available for nationals from Mercosur countries, Bolivia and Chile, that allows them to carry out different activities in Colombia, including work.
11.4.3 NE Visa (Business Visa)

An NE visa may be granted for up to four years, with multiple entries of up to one year each. It is used to enter Colombia to conduct business, attend meetings or carry out marketing studies.

11.4.4 The PIP-6 permit

A PIP-6 permit may be granted for a maximum of 180 days per year for individuals with non-restricted nationalities. For European nationals, the PIP-5 replaces this permit. The PIP-6 permit may be used instead of a business visa when the individual will not be acting as a legal representative of a business.

11.5. Collective terminations

There are legal limits on the percentage of a workforce which a company can dismiss in any six-month period. This restricts large-scale redundancies. While it is possible to seek government approval for such reorganizations, this is a lengthy and complex process.

To avoid this, companies can offer collective termination packages to employees. If accepted by employees, the termination will be deemed to be by mutual consent and will not be subject to the restrictions.

11.6. Contact us

If you have any questions about employment law or business reorganizations, please contact Tatiana Garces or Evelyn Romero:

Tatiana Garces  
+57 1 634 1543  
tatiana.garces@bakermckenzie.com

Evelyn Romero  
+57 1 634 1566  
evelyn.romero@bakermckenzie.com
12 Competition/Antitrust Law

Antitrust and competition laws in Colombia closely resemble the regimes found in North America and Europe. This chapter examines the key features of the regime, including investigation and enforcement activities.

Greater powers and an increased budget have seen the competition authority in Colombia become increasingly active in recent years, resulting in more and larger fines being levied for breaches.

We advise major local and multinational companies on all aspects of competition compliance, from clearance applications as a result M&A activity to drafting commercial agreements as part of daily operations.

Our global presence allows us to co-ordinate and ensure antitrust compliance across multiple jurisdictions, in complex cross-border transactions and international trade arrangements.

12.1 General framework

The Colombian competition regime regulates and prohibits trade arrangements, business practices and M&A activity which restricts competition. The authority which runs the regime is the Superintendence of Industry and Commerce (“SIC”).

The SIC has wide powers to investigate companies and regularly uses them to carry out measures such as dawn raids to seize information. There is also an active leniency program which encourages companies to report anti-competitive practices in return for relief from sanctions.

The SIC can impose significant fines for restrictive trade practices. It also has powers to block mergers and can impose fines for failure to obtain clearance for mergers.
12.2. Restrictive agreements

There is a general rule that any agreement that has the purpose or the effect of restricting free competition is illegal.

Restrictive agreements are defined widely and include any kind of arrangement (including tacit behaviors) that, directly or indirectly, has the purpose or the effect of limiting competition.

Practices such as cartels, price fixing, market allocation and non-compete agreements are all deemed to be restrictive. Trade associations are permitted, but may be viewed as an ideal forum for the exchange of information which could lead to restrictive practices.

Collusion in tenders or bid-rigging are restrictive practices. Due to their potential to defraud the Colombian government, they are also a criminal felony which could lead to imprisonment.

12.3. Actions by single firms

Restricted conducts by single firms include abuse of dominance and individual acts carried out by companies which limit competition.

To have a dominant position is not prohibited in Colombia. Dominance is not defined by quantitative criteria, such as market share, but by the possibility that a company may determine the market conditions without having to consider the potential reactions of competitors or by any party in the supply chain.

In practice, this means that it can be difficult for the SIC to establish that a company has a dominant position.

The abuse of dominance is any conduct that restricts competition by affecting consumers or competitors, such as predatory prices, tying agreements and the imposition of different conditions to third parties.

Actions carried out by companies that do not have a dominant position may also be sanctioned when the act is considered relevant and has the possibility to restrict competition in the Colombian market.
12.4. Merger control

12.4.1 Thresholds for merger approval

Where the combined value of the operational turnover and assets of the parties to a merger exceed the legal threshold, then approval for the transaction will be needed from the SIC. The threshold is updated annually and is COP 44,263,020,000 (USD 15,263,110) for 2017.

Any transaction resulting in an economic concentration in at least one market in Colombia, either between parties engaged in the same economic activity (horizontal effects) or in the same value chain (vertical effects), are subject to merger control regulations.

The concept of economic concentration is broad and includes mergers, acquisitions, joint ventures, other forms of company associations or corporate grouping, and even exclusive distribution agreements.

12.4.2 Application for merger approval

Where the combined market share of the parties is below 20%, a simplified notification procedure is available which provides implied approval within 10 business days of the application to the SIC.

Parties need to submit information about the merger, including evidence that the market share is below 20%, with their application. The SIC has 10 business days to approve the application or determine that the transaction needs to go through the full clearance process.

The implied approval granted under this procedure can be challenged at a future date by the SIC, if it later considers that the parties were not eligible. The SIC has a term of up to five years from the filing date to review and challenge the notice. This can lead to a full investigation of the merger and fines for failure to seek proper clearance.

If the combined market share of the parties is above 20%, the full clearance process will need to be followed. Parties need to submit an application supported by more detailed information about the merger.
The SIC has 30 business days to decide whether to (i) authorize the transaction, or (ii) request more information about the merger.

Where the parties have to submit additional information, the SIC has three additional months to issue a final decision to (i) approve, (ii) oppose, or (iii) impose remedies to the proposed transaction.

The SIC may impose structural remedies to the transaction, for example requiring parties to sell certain assets or sections of the business. It may also impose behavioral sanctions restricting certain practices, but these are used less commonly.

12.5. Sanctions

The SIC may impose fines up to the following limits:

- Administrative fines against the companies involved, up to COP 73,771,700,000 (USD 25,438,517).

- Administrative fines against individuals responsible for restrictive practices or failure to obtain clearance before closing a transaction, up to COP 1,475,434,000 (USD 508,770).

- Bid rigging conducts may be penalized with imprisonment from six to 12 years, fines of up to COP 737,717,000 (USD 254,385) and a ban from contracting with state agencies for five years.

In 2013, the SIC fined Colombia’s dominant mobile telephone service company USD 47 million for two separate competition law violations relating to phone number portability.

12.6. Unfair competition

Where a company believes a competitor is acting fraudulently or dishonestly, it can bring a claim before the SIC for unfair competition. If successful, the SIC can award damages and injunctive relief.

Unfair competition is defined as any action which is: contrary to sound mercantile practices; not based on adequate good faith standards; inconsistent with honest practices in industrial and trade
matters; and is intended to restrict, or actually restricts the liberty of a customer to make a choice in the market.

Competition provisions specifically prohibit actions such as fraud, solicitation, discrediting of competitors, misleading advertisement by the comparison of products or services, misleading imitation of products or services, exploitation of third-party reputation, violation of privacy rights, acts that persuade individuals or companies to terminate or breach agreements, unfair advantages arising from the infringement of statutes and unfair exclusivity agreements.

If the acts prohibited under the unfair competition provisions affect the public interest, the SIC may start an investigation to determine if the acts also breach the antitrust regime. Certain acts considered to be unfair competition may also breach criminal law.

12.7. Contact us

For further information, or to discuss any aspect of the antitrust regime, please contact Carolina Pardo:

Carolina Pardo
+57 1 634 1559
[carolina.pardo@bakermckenzie.com](mailto:carolina.pardo@bakermckenzie.com)
13 Environmental Regulation

Environmental licenses are generally required in Colombia to carry out activities which may adversely affect natural resources or indigenous communities. This chapter outlines the key features of the licensing regime, approach to enforcement and sanctions for breaches.

Regulations list a wide range of business activities for which it is possible to obtain licenses. Whether such a license is needed should be identified as soon as possible, as the application process can be lengthy and operations will be restricted until approval is granted.

We help businesses apply for and acquire new licenses, review operations to ensure best practice and manage administrative procedures to mitigate the risk and impact of any breaches.

13.1. Environmental licensing authorities

The bodies responsible for environmental licensing and permitting are mainly the National Environmental Licensing Agency (“ANLA”) and the Regional Autonomous and Sustainable Development Corporations (“CAR”). Large cities may also have separate authorities for activities carried out within urban areas.

The ANLA is a national body which issues licenses for large-scale projects in industries such as oil and gas, mining, energy generation, chemicals and ports. CARs issue licenses at the regional level for smaller-scale projects and permits for using natural resources.

13.2. Activities which require environmental licenses and permits

Regulations set out a full list of the projects, works and activities that require an environmental license.

Activities in the following sectors will generally require a license from ANLA: oil and gas; mining; construction of dams and reservoirs; energy generation; ports and airports; construction of national roads and railways; and production and import of certain substances.
13.3. Application process

Applications to ANLA for larger scale projects must be accompanied by an Environmental Impact Assessment and detailed information about the proposed project. The application process typically takes from 4 to 6 months but can take up to a year.

Applications to CARs follow a similar process.

13.4. Indigenous and Afro-Colombian communities

Natural resources should be exploited without harming the cultural, social and economic integrity of indigenous and Afro-Colombian communities. Where projects are likely to impact these communities, businesses must carry out consultation before starting operations.

Regulations set out the process for consultations, which should be carried out before obtaining the environmental license.

If businesses start operations without consulting with the relevant indigenous or Afro-Colombian communities (which would be affected by the planned activities), the courts have the power to suspend operations until the consultation process is properly carried out.

13.5. Scope of license

A single global environmental license will cover all activities and include all necessary permissions for a given project. The term of the environmental license will equal the term of the projects and so renewals are not generally required.

13.6. Transfer of licenses

All environmental licenses contain assignment provisions and can be transferred. This allows companies to benefit from existing licenses when acquiring or selling businesses with existing operations.
13.7. Regional permits

Projects which do not need an ANLA environmental license may need permits from the relevant CAR where natural resources are affected.

13.8. Water regime

Rivers, riverbeds and all non-maritime waters are generally for public use and their exploitation requires a water concession.

Concessions are granted by CARs, indicating the obligations of the concessionaire, the term of the concession (which is generally 10 years), any applicable fees and restrictions on the use of water.

Liquid waste discharge is regulated. As a rule, the disposal of liquid waste in the streets or sewage systems is prohibited. Disposing of liquid waste in a river, stream or flowing water requires a permit from the relevant CAR. Disposal in sewage systems must be registered.

The process to obtain a water concession, or a discharge permit, typically takes from three to six months.

13.9. Air regime

13.9.1 Atmospheric emissions

The discharge into the atmosphere of dust, vapors, gases and toxic emissions is regulated. Businesses will require an atmospheric emission permits whenever these surpass certain levels.

Permits are commonly required for activities such as the commercial use of boilers or incinerators, operation of thermoelectric plants, petrochemical manufacturing, and burning fuels in gas and oil fields.

13.9.2 Noise

Permits may be required for noise contamination. This is defined as any sound that adversely affects the health and safety of individuals, their property or their enjoyment of their property. Regulations define maximum admissible noise levels for different areas.
13.9.3 Offensive odors
Activities generating offensive odors will require a permit.

13.10. Solid waste
Regulations set out a number of obligations that must be observed by individuals and companies when discharging nonhazardous waste.

Those who generate hazardous waste are liable for all its residues, emissions, products and subproducts, and for all the effects on public health and the environment.

Manufacturers, importers, and/or transporters of a product or chemical substance with hazardous properties have the same responsibility as the generators of such substances. Introduction into the country of nuclear or toxic waste is prohibited.

13.11. Enforcement
License holders are required to submit regular compliance reports to the relevant licensing authorities. These are generally required every six months but this may be relaxed by agreement to annual reports.

In addition to these reports, ANLA has the power to carry out inspections without prior warning. Such inspections are common.

13.12. Claims
Individuals who have been affected by breaches of environmental regulations may bring claims against the entity responsible for the breach. Such claims can seek to protect fundamental rights or claim damages following injury.

When the number of people who have suffered injuries exceeds 20, and those injuries are attributable to the same cause, they may jointly file a class action. In a class action, compensation for damages may be obtained even for individuals who were not parties to the action.
A person may also file an action seeking the protection of the collective right to a healthy environment on behalf of a community.

13.13. Remedies and sanctions for breaches

Where license holders infringe regulations, the corresponding authorities may impose:

- Sanctions in the form of fines; revocation of environmental licenses, authorizations or permits; temporary or permanent closing of the activity, building or service; and demolition of buildings or civil works at the expense of the offender.

- Preventive measures in the form of a written warning; confiscation of illegally obtained flora or fauna; confiscation of products, components or tools used to cause the offense; or suspension of the activity or work.

Where individuals bring claims, damages may be awarded.


Pollution or damage to the environment can lead to criminal prosecution in Colombia. Companies cannot be held criminally liable, and so individuals representing and making decisions on behalf of the companies, such as directors, can face fines and even imprisonment.

13.15. Contact us

For further information or to discuss any environmental regulation, please contact Alejandro Mesa or Camila Jimenez:

Alejandro Mesa  
+57 1 634 1551  
alejandro.mesa@bakermckenzie.com

Camila Jimenez  
+57 1 634 1555  
camila.jimenez@bakermckenzie.com
14 Intellectual Property and Trade Secrets

Colombia’s IP laws adhere to common international standards and it has one of the leading registration and enforcement regimes in Latin America. This chapter outlines the key features and related topics, including unfair competition.

Investment in specialist IP courts and registration offices, adoption of global standards and membership of international treaties have helped Colombia reduce administrative burdens and provide an IP landscape which will be familiar to international businesses.

We help clients acquire, protect and exploit IP rights, often as part of managing large portfolios across multiple jurisdictions. From brand enforcement and litigation, to licensing and advertising, we understand that IP management is a strategic issue for global business.

14.1. Legal framework

Colombia is an active member of the World Intellectual Property Organization (“WIPO”), World Trade Organization (“WTO”) and related IP agreements such as the Paris Convention, Madrid Protocol, TRIPS, Trademark Law Treaty and Patent Cooperation Treaty.

A specialist public body, the Superintendence of Industry and Commerce (“SIC”), deals with the registration, regulation and enforcement of industrial property rights in Colombia.

Within the SIC, there are separate offices dealing with trademarks, patents and designs. There is also a judicial branch with specialist courts for deciding IP and unfair competition claims.

There are separate bodies dealing with copyright registration and proceedings (National Direction for Author’s Rights) and for the registration of plant varieties (the Colombian Agricultural Institute).

In general, Colombia operates a pre-grant system, where objections to the granting of industrial property rights are raised during the
application process, before the rights are granted. After rights have been granted, a court order is needed to invalidate decisions.

14.2. Trademarks

In general, companies may register any sign that distinguishes their products or services as a trademark in Colombia, including a sound, smell, letter, number, shape or packaging.

Rights last for 10 years, renewable for successive 10-year periods, and are restricted to the class of products or services in the registration.

It is important for companies to register any distinctive signs, as exclusive legal rights are only acquired on registration. Use of the sign will only grant protection to notorious trademarks.

14.2.1 Application and registration

Companies can apply directly to the Colombian Trademark Office for registration, or make a single application in their country of residence to WIPO for registration in multiple jurisdictions, including Colombia.

It typically takes from six to twelve months to be granted trademark rights in Colombia, largely depending on whether third parties raise objections to the registration during the application process.

Priority rights are granted for six months from the date of the first application in any member country of the WTO.

14.2.2 Protecting trademark rights

Trademark rights may be cancelled if not used in three years after registration, or if the mark loses its distinctive character. They may be annulled by court order. Owners or third parties authorized by owners can bring claims before the courts for trademark infringement.

If not renewed, trademarks expire after 10 years. There is a 6-month grace period to apply for renewal after the end of the 10-year term.
14.3. Patents

Patents are available for inventions and utility models in Colombia. Rights last for 20 years for inventions and 10 years for utility models.

In recent years, Colombia has invested in becoming a patent-friendly jurisdiction, reducing average application times to two years.

14.3.1 Application and registration

The most common way to apply for a patent in Colombia is with an International Application under the Patent Cooperation Treaty. A National Phase Application in Colombia can then be entered within 31 months from the priority date.

The time to process applications can be reduced under Fast Track or Patent Prosecution Highway agreements, in place with patent offices in the USA, Japan, Korea, Spain and the European Patent Office.

14.3.2 Protecting patents

Annual fees must be paid to keep the patent enforceable, or the patent will be cancelled.

Third parties may apply for a compulsory license where the owner is not working the patent. The government may request a compulsory license based on matters of public interest or national security.

14.4. Copyright

Authors of literary and artistic work will automatically own copyright in the works, which can include computer programs and databases.

While the original author will always hold the moral rights (of attribution and integrity), economic rights (eg, to sell, copy, distribute) can be freely licensed or assigned to other parties.

Where a work is created under an employment or services contract, the person for whom the work was prepared is considered the owner of the economic rights, unless the parties have agreed otherwise.
Economic rights owned by individuals are valid for the life of the author, plus 80 years. Where a company is the owner, this is currently 50 years, but is due to be increased to 70 years.

14.4.1 Registration

Copyright arises as soon as a “perceptible” work exists and registration is not mandatory. However, registration establishes a legal presumption regarding ownership and the date of creation.

The registration process usually takes 15 business days.

14.5. Trade secrets

Trade secrets are protected under unfair competition regulations, provided that the relevant information is (i) secret, (ii) of commercial value and (iii) the holder has taken reasonable steps to keep it secret.

Generally, anyone who receives a trade secret is under an obligation not to disclose it, unless otherwise agreed with the holder.

Provisions in employment, services, confidentiality or commercial agreements which aim to protect trade secrets must be carefully drafted to ensure that they do not breach competition laws.

14.6. Industrial designs

The two-dimensional design or three-dimensional features of a product can be registered as an industrial design, including patterns, lines, colors and textures of surfaces.

The application process currently takes around six months and registration is granted for 10 years.

14.7. Plant Varieties

Exclusive rights can be granted to persons who have created plant varieties which are new, uniform, distinct and stable.
Registration stops others using the variety and products essentially derived from it. Rights last 25 years for vines, fruit and forest trees, and 20 years for other species. Annual fees must be paid for this right.

14.8. Enforcement

Rights owners in Colombia can bring civil claims and can also provide evidence to the state to prompt criminal prosecutions.

Provisional measures such as injunctions and seizure of goods are available in civil proceedings. These can be in place within two days of the application and are common where the owner can provide evidence that (i) they own the relevant IP right, (ii) an infringement has or will occur and (iii) urgent action is justified.

The owner of an IP right may also send a cease and desist letter, to try to resolve a dispute outside court. Mediation is a prerequisite to bring a civil court claim, but can be replaced with an injunction request.

A full claim can be brought before the specialist IP court at the SIC, with a decision typically taking about one year. Such a decision may be subject to appeal to higher courts.

Remedies available include payment of damages, the seizure and withdrawal from the market of goods, injunction preventing further activity and, following a final court decision, destruction of the goods.

Where infringement may constitute a criminal breach, rights owners can provide evidence to prompt a prosecution. The prosecutor may order a “dawn raid” if there are reasonable grounds, where police will seize counterfeit products and tools used to make them. This can be used to curb ongoing infringements and destroy counterfeit goods.

14.8.1 Unfair competition

Actions contrary to good faith that are defined as unfair competition may breach competition regulations. Unfair competition claims are heard by specialist courts such as the SIC. They can be used to protect industrial property rights and trade secrets, as well as to stop
misleading acts or other acts affecting lawful competition. Claims may be brought to prevent future acts or stop ongoing acts. Payment of damages may also be sought. See section 12.6 for further details.

14.8.2 Border measures

Customs authorities are entitled to intercept merchandise being imported or in transit if it is suspected of being counterfeit.

Trademark owners can register with authorities and train customs officers on how to identify counterfeit products. Where they identify suspected counterfeit goods, customs officers may seize the goods.

This seizure lasts while the owner brings a claim before the SIC. Until the claim is decided, the goods will be kept by the customs authority.

14.9. Exploitation

Licensing or assigning IP rights, to copy, distribute, sell or adapt products and services is a key part of many business operations.

The transfer of rights in Colombia is generally permitted, subject to certain formalities. Documents giving permission to use IP rights must be properly drafted to ensure owners retain the appropriate level of control and do not diminish the value of their IP portfolio.

14.10. Contact us

If you have any questions about acquiring, enforcing or exploiting IP rights, please contact Juan Pablo Concha:

Juan Pablo Concha
+57 1 634 1536
juan.concha@bakermckenzie.com
15 Trade, e-commerce and Consumer Protection

There is a well-established consumer protection regime in Colombia and trade in certain food, medical and chemical products is regulated. This chapter outlines the rights afforded to consumers, the regulations for e-commerce and the process for licensing controlled goods.

Businesses need to ensure all goods comply with mandatory quality standards and that consumers can exercise legal rights to repair or replacement in certain situations. Online sales are increasingly common in Colombia and are subject to additional regulation.

We help domestic and international companies ensure their terms and conditions are compliant and review online sales processes. For those trading in regulated items, we advise on the licensing and registration required for the import, sale and manufacture of controlled goods.

15.1. Overview of consumer protection

Consumer protection laws apply to all business-to-consumer relationships. This can include business-to-business sales where the buyer is not using the goods or services for its business activities.

The key requirements are that every good or service ("Product") must be safe, include all relevant information, reasonably conform to an ordinary consumer’s expectations and be fit for its specific purpose.

Where Products do not meet these requirements, consumers have rights to demand a repair, replacement or in some cases, a refund.

15.2. Implied warranty

The law implies minimum legal standards which apply to all Products. Where suppliers have written terms and conditions, these cannot be less protective than the implied standards. These include repair at no cost, provision of instructions and technical assistance.
There is no statutory minimum warranty term. If suppliers do not specify the term, the law implies a warranty term of one year.

15.3. Repair and replacement

Consumers can demand repairs under a valid Product warranty claim. These should be carried out promptly to avoid further product liability claims, which can lead to fines for delay.

Businesses cannot charge consumers for such repairs, but may elect to replace the Product instead of carrying out repairs.

15.4. Product liability

Manufacturers, suppliers and importers are jointly and severally liable for damages caused by defective Products. There are certain exemptions where the seller was not at fault, such as inappropriate use by the consumer, or when the Product is recalled.

15.5. Information to consumers

Every Product sold in Colombia must include the following information in Spanish: (i) the scope of the limited warranty; (ii) instructions and related information on correct usage; (iii) the specific characteristics, weight, units, volume and other internal features; (iv) expiration date when applicable; and (v) price, explaining the amount of taxes and all other costs (eg, transportation and packaging).

15.6. E-commerce regulations

In addition to the consumer protection standards set out above, all consumer sales carried out online are subject to further e-commerce regulations. These are based on the United Nations Model Law.

The online purchasing process must include a final confirmation step which gives details of the total amount and conditions of purchase, and provides a mechanism that clearly prompts the consumer if he or she wishes to proceed or not.
Delivery times cannot exceed 30 days, unless clearly acknowledged by the customer. Consumers must also be informed of their rights of withdrawal from the contract.

A privacy policy and terms and conditions of use must be available on the website, in Spanish and in a printable version.

The following additional information must also be given: (i) the complete name, place of incorporation, and contact details of the seller; (ii) precise information on the Product’s components, characteristics, materials and properties, together with pictures; (iii) term of validity of the offer and availability of the products; (iv) available payment methods; (v) delivery time; and (vi) the total price, including taxes, shipping and any other costs.

15.6.1 Right to reject goods and receive refund

Customers who use a credit or debit card (or other electronic payment) may reject Products bought online and receive a full refund where: (i) there has been fraud; (ii) the transaction has not been requested; (iii) the Product was not received within 30 days; (iv) the Product delivered was not the one requested; or (v) the Product is defective.

The consumer must submit a claim to the supplier within five working days of becoming aware of the event which gives rise to the claim.

15.6.2 Enforcement and sanctions for breaches

The consumer protection regulator is the Superintendence of Industry and Commerce ("SIC"). This is the same body which regulates the antitrust, unfair competition and intellectual property regimes.

The SIC actively monitors the activities of businesses and has powers to investigate companies. Consumers may also raise claims directly with the SIC to enforce their rights.

The SIC has powers to suspend activities, close online operations and impose fines of up to roughly COP 1,475,434,000 (USD 508,770).
15.7. Regulatory approvals, health registrations and licenses

The import, manufacture and sale of goods such as pharmaceutical products, food, cosmetics, alcoholic drinks, medical devices and cleaning products are regulated in Colombia.

Licenses are required in relation to the products and the facilities where they are manufactured or stored. There are also regulations around the promotion, labelling and packaging of such goods.

The National Institute for the Surveillance of Medicines and Food ("Invima") controls licensing of food, medicines, medical devices and other health products. Such items must be registered with Invima.

Registering products can take up to one year and permits will be valid for between five and 10 years, depending on the nature of the goods. There is no restriction on foreign companies holding such permits.

The registration, importation, use, storage and sale of controlled substances, such as chemicals, are subject to a separate regime. This is administered by a specialist public body for the control and auditing of chemical substances and narcotics.

15.8. Electronic contract formation

In general, electronic messages have the same legal effect as written documents under Colombian law. This means parties can conclude contracts online and by telephone (except for specific agreements which must be in writing, such as the sale of real estate).

15.9. Electronic signatures

In general terms, electronic signatures have been recognized to have the same legal effect as handwritten signatures.

Electronic signatures are defined as any trustful and proper method that incorporates, attaches or logically associates a data message to the identity of the signer. They can take the form of basic electronic signatures, or digital signatures.
15.9.1 Basic electronic signatures

An electronic signature is one which can be verified to confirm that a certain individual signed a document. Methods used to provide this verification include codes, passwords, biometric data or private cryptographic keys that identify a person.

To be considered authentic, it must be possible to establish with reasonable certainty that an electronic signature was generated by the author and that it has not been modified.

15.9.2 Digital signatures

A digital signature is a type of encryption applied to electronic signatures which helps ensure the integrity of the data in a signed document and verify the authenticity of the signature.

Digital signatures are only used for specific types of transaction, often where sensitive data is being transferred, such as the exchange of confidential information or financial transactions.

Only the SIC or those bodies expressly authorized by the SIC may authorize digital signatures in Colombia.

In general, the digital signature certificates must prove that the signature is: (i) only available to the person that it identifies and has been kept in his or her sole control; (ii) verifiable; and (iii) linked to the message that it signs in such a way that any change to the message will invalidate the digital signature.
15.10. Contact us

For further information or to discuss how consumer protection may affect your business, please contact Carolina Pardo:

Carolina Pardo
+57 1 634 1559
carolina.pardo@bakermckenzie.com
16 Privacy and Data Protection

Rights to privacy are protected in Colombia and data protection laws restrict how personal data can be used. This chapter outlines the obligations on companies and rights of individuals.

The Colombian data protection regime resembles that in the European Union and global businesses will be familiar with the main features. However, standard agreements and operations will usually need to be adapted to ensure compliance and reduce the risk of breaches.

We advise clients on privacy policies, collection, use and destruction of data, privacy complaints, investigations, transfer and transmission agreements. We also carry out domestic and multi-jurisdictional data protection reviews to ensure compliance across multiple regimes.

16.1. Overview of data protection regime

In Colombia, under the constitution any individual or legal entity has the right to demand that anyone who manages and collects his or her personal data do so in a proper and lawful way.

Wider data protection laws stipulate that any collection, use, transfer, storage or processing of personal data requires prior, express and informed consent from the data subject. This qualified consent is the backbone of the Colombian data protection system.

Personal data is defined broadly and includes any information related to one or more individuals or which can be associated with an individual, whether it is stored electronically or in hard copy.

As well as always obtaining adequate consent, companies also need to register any databases containing personal information and be able to demonstrate that specific measures are in place to ensure compliance.

The Superintendence of Industry and Commerce ("SIC") is the data protection authority and privacy regulator. It has powers to impose fines, suspend activities and close establishments for breaches.
16.2. Consent and sensitive personal data

Companies must ensure that individuals provide informed consent before collection, use or processing of any personal data.

To be informed, such consent must notify the individual of issues including how the data will be used, the identity of who will control the data, the rights the individual has in relation to the data, how those rights can be exercised and access to a privacy policy.

Where sensitive personal data is involved, companies cannot make the provision of goods or services dependent on providing such data.

Sensitive personal data is defined as any racial or ethnic origin, political opinions, religious, philosophical or moral beliefs, labor union membership, information concerning health conditions, sexual preferences, and any data whose misuse can lead to discrimination.

16.3. Rights of individuals

Individuals have the right to access and verify their personal data at any time for free. They can request that amendments be made to the personal data, including removing certain information.

Individuals may also ask for evidence of their consent and revoke such consent at any time. These rights are restricted for personal data held by credit risk agencies (see section 16.6 below for details).

16.4. National Database Registry

All databases containing personal data of Colombian residents must be registered with the SIC. The deadline for data controllers domiciled in Colombia to register databases is 30 June 2017. The registration process for foreign data controllers has not yet been enabled and the SIC is reviewing its implementation.

The register is available to the public. The contents of the databases are not on the register. It is used by the SIC to monitor compliance. The information which must be provided includes the identity and contact details of the data controller and any processors, the purpose
and policy for processing, types of data included, description of security measures and information related to any data transfer or transmission.

We provide compliance assessment and registration services for clients to ensure they provide the correct level of information.

16.5. Data transfers and transmissions

In general, any transfer of personal data to another legal entity in a country which does not offer adequate levels of protection will require the prior, informed consent of data subjects. This includes the transfer of data to companies within the same corporate group.

An exception to this rule exists where data controllers have entered a data transmission agreement with an entity who is acting as a data processor (for example when outsourcing functions such as payroll). Provided the data transmission agreement complies with regulations, such as all parties having the same privacy policy, prior consent for the transmission will not be required from the data subjects.

The transfer of data abroad without prior consent is allowed in principle, but only where the SIC has stated that the country involved provides adequate levels of protection.

The list of relevant countries was still being finalized by the SIC at the start of 2017. The result is that any international transfer will require prior consent until the list is confirmed. It is expected that the list, of approximately 40 countries, will come into force during 2017.

16.6. Credit risk agencies

There is a special regime in place for companies which carry out credit ratings in relation to the provision of credit.

Prior, informed and express consent is required in relation to personal data used for the purpose of such ratings, but there are separate regulations for data categorized as public, semi-private and private.
Restrictions require companies to inform the subject and provide an opportunity to resolve issues before formally reporting any negative credit information.

Individuals can only access their data once a month and they cannot revoke their consent if the obligation that provoked the granting of the consent remains current.

16.7. The accountability principle

Companies must to be able to demonstrate that they are taking adequate steps and have measures in place to comply with the data protection regime. This is known as the accountability principle.

SIC guidelines explain steps companies may take to demonstrate compliance with the privacy regime. While not mandatory, following the guidelines is likely to see companies receive more lenient sanctions if breaches do occur.

The SIC guidelines encourage organizations to:

- Implement a privacy management program, including a data protection officer, internal report and audit mechanisms
- Train employees on data protection, carry out privacy impact assessments, and implement procedures for handling data, privacy complaints and responding to breaches
- Monitor, evaluate and update all data protection policies

16.8. Enforcement and sanctions

The SIC is the body responsible for regulating the data protection regime in relation to most private companies. The Superintendence of Finance is the regulator for financial institutions and the Public Ministry (Procuraduría General de la Nación) for public bodies.

The data protection regime is relatively new and the focus of the SIC to date has largely been on educating companies and increasing awareness of the need to comply with regulations.
This focus is likely to turn to enforcement and investigations, in particular after the deadline of 30 June 2017 for registering databases.

The SIC has wide powers to investigate companies and impose sanctions for breaches, including fines of up to COP 1,475,434,000 (USD 508,770), suspension of business activities and even the closure of operations. Criminal prosecutions may also be brought for processing data without consent in order to receive a financial gain.

16.9. Contact us

For further information, or to discuss any business activity involving personal data, please contact Carolina Pardo:

Carolina Pardo
+57 1 634 1559
carolina.pardo@bakermckenzie.com
17 Dispute Resolution

Colombia has an independent judiciary which includes specialist courts for commercial disputes and the use of alternative dispute resolution is common. This chapter outlines the main features of litigation and the use of alternative dispute resolution.

Commercial disputes in Colombia are frequently resolved using arbitration, which while still costly, is usually far quicker and may be more familiar to global businesses than the court system.

We advise clients on all aspects of litigation, from bringing court claims to negotiating settlements and international arbitration. Our global expertise means we can confidently manage claims arising from cross-border transactions which cover multiple jurisdictions.

17.1. Overview of judicial proceedings

As a rule, before turning to the Colombian courts the parties must try to resolve the dispute through a conciliation process, where a neutral third party will encourage the parties to reach an agreement.

Where such an agreement cannot be found, the parties may bring a claim before the relevant court. After a judgment is made, the principle is that the loser will pay the costs of the winning party. In practice, only a percentage of the final costs will be recovered.

Losing parties may be able to appeal the decision of a court before the relevant superior court.

17.2. Jurisdictions

There are several jurisdictions, or types of court, in Colombia which specialize in different claims.

The most common claims for companies will be in the civil jurisdiction, which hears most commercial disputes, such as contractual claims. It also hears employment and family claims.
There are also specialist courts within government agencies which can hear unfair competition, consumer protection and intellectual property disputes. These courts have more expertise in resolving disputes in these areas and are generally more familiar with the issues involved.

Other jurisdictions include the constitutional jurisdiction, the administrative jurisdiction (for matters relating to the state), and the indigenous jurisdiction, which settles disputes in accordance with indigenous norms and proceedings.

17.3. Arbitration

Arbitration is becoming increasingly common in Colombia. Recent legal developments have aimed to encourage domestic and international arbitration as an effective method of resolving disputes.

Arbitration is often preferred by companies as it is generally quicker than going through the courts and the arbitrators involved will often be specialists in the relevant field.

Colombia’s arbitration laws are based on the Uncitral Model Law and the proceedings under them follow recognized international practices in relation to matters such as the appointment of arbitrators, use of interim measures, gathering of evidence and enforcement of awards.

On average, it takes approximately one year to obtain an arbitration award in Colombia. There are no rights to appeal such awards and they will be binding on the parties. It may be possible to apply for awards to be annulled, but only in limited circumstances.

Parties may follow Colombian arbitration proceedings, or in many cases they will choose to submit claims to international arbitration. Such claims can still be heard in Colombia, but will be conducted according to international rules and may involve foreign arbitrators.
17.4. Civil claims

The most common claims before civil courts include debt recovery proceedings, actions to enforce a security interest and declarative proceedings to establish the rights of parties.

Debt recovering proceedings are used to recover amounts which it has been established are owed to a party. The proceedings may last from one to three years and injunctive relief, such as the freezing of assets and attachment orders, is available.

A creditor may be able to enforce their security directly without judicial proceedings. This procedure is only available in certain circumstances, generally when the creditor is already in possession of the relevant assets (see section 5.8 for further details).

Declarative proceedings are used to seek a judgment on issues such as the rights of parties, their liability, or the validity of contracts. These proceedings can take from two to five years. Injunctive relief may be available for the protection of the disputed rights.

17.5. Administrative claims

Administrative claims are those which involve contracts with, decisions, or actions of public bodies.

The most common claims are those to declare a decision by a public body null and void, contractual disputes and the payment of compensation where the state’s actions have caused damage.

17.6. Constitutional issues

The Constitutional Court reviews the compatibility of laws with the constitution. The most common actions, “tutelas”, are designed to protect fundamental rights. Such claims are popular as the courts must decide the relevant issues within 10 business days.

Tutelas can be used by individuals to defend their rights or by legal entities to establish due process.
17.7. Class actions and collective rights

Class actions are an action in which a group of at least 20 people claim damages that are attributable to the same cause. The damages can be claimed by others who are not parties to the action, but who can show that they suffered damage from the same cause or event.

Collective rights actions or people’s actions can be filed by any person on behalf of a community to protect their collective rights.

People’s actions are aimed at obtaining a court order to stop the harmful activity and restore any damage caused to the collective rights. These claims can be brought in relation to issues such as the environment, competition, public health and consumer rights.

17.8. Enforcement of arbitration awards

A domestic arbitration award is enforceable immediately without the need of further recognition. International awards issued by a tribunal seated in Colombia will be treated as domestic awards.

Foreign awards require recognition by the courts to be enforceable. The process for this follows the same standards and almost the same terms established by the New York Convention (the few differences relate to formal requirements for the request for recognition).

The recognition of a foreign award can only be denied in limited circumstances, such as when the matter cannot be submitted to arbitration under Colombian law or that the recognition of the award would be contrary to Colombian international public policy.

17.9. Enforcement of foreign judgments

A foreign judgment or court ruling will be enforceable in Colombia on the basis of reciprocity, provided that it meets certain requirements.

These requirements are that the judgment: (i) does not relate to the rights to real property located in Colombia at the time the suit was filed; (ii) does not contravene any public policy laws or regulations of
Colombia; (iii) is a final judgment 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 refer to an issue pending for decision before Colombian courts or already decided by Colombian courts; (vi) has been obtained in compliance with the applicable foreign laws relating to service of process on the defendant; and (vii) is validated by the Colombian Supreme Court pursuant to a proceeding called “exequatur”.

The *exequatur* procedure does not relate to the merits of a case. However, it is a complex procedure and care needs to be taken when completing it to ensure claims do not fail due to technical mistakes.

If the *exequatur* is granted, 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 of them in a public auction.

17.10. Contact us

For further detail on judicial proceedings or to discuss any potential dispute, please contact Claudia Benavides:

Claudia Benavides  
+57 1 634 1563  
claudia.benavides@bakermckenzie.com
18  Real Estate

Colombia has a well-established real estate regime where investment, financing and development activity by foreign entities is common. This chapter outlines the key features when completing transactions.

A national land registration system, combined with trusted mechanisms to assure payments, provides investors with a reliable, structured regime for completing property transactions.

We help clients, including institutional and private equity investors, banks, hotels and REITS, with their real estate needs, from buying, selling and leasing property to financing and constructing projects.

18.1. System of land registration

Colombia has a national system where interests over property are formally registered. This includes details of ownership, transfers, leases, mortgages, easements and rights of way.

Ownership may only be proven with the property certificate issued by the relevant public registry office and title will only be transferred following a transaction when the sales agreement is registered.

While the land register can be searched to ascertain who holds rights over a property, it does not provide a qualitative statement concerning the status of the legal title. As such, full due diligence into potential rights and associated risks will be required in any transaction.

18.2. Restrictions on foreign land ownership

There are no restrictions on foreigners owning real property.

18.3. Government expropriation

The state may force owners to sell land for reasons of public interest, for example when building highways or national infrastructure projects. Compensation is provided at the market rate.
18.4. Types of real estate transaction

Common interests in real estate include leasehold, freehold, possession (e.g., usufruct) and condominium. Investments may be made by individual companies or as part of joint ventures, partnerships and more complex structures such as real estate investment trusts.

Financing is frequently provided by domestic and international banks, with loans secured by mortgages over the relevant property. Interest rates fixed by lenders are generally lower than other market rates.

18.5. Liability following sale of property

In general, the new owner will be liable for issues arising after the sale and the seller will be liable for issues which arose prior to the sale. Due diligence must be carried out to identify liabilities which fall outside this principle, for example in relation to some condominiums.

The seller will guarantee the buyer’s right of ownership and the good physical condition of the property, in the form of an indemnity covering third party claims and hidden defects in the property.

18.6. Process for acquiring real property

Once parties have agreed the terms of a transaction, they will enter a Promissory Sales Agreement. This must contain all terms required for the transaction, including the description of the property and price.

The Promissory Sales Agreement does not complete the transfer of title, but commits the parties to carrying out the transaction. It is a legally binding document which finalizes the terms of the transaction.

Where a party breaches the Promissory Sales Agreement, for example by not completing the sale, this will give rise to a claim for damages. It is common to include an exit right which specifies an agreed amount of money to be paid to pull out of the sale and/or a penalty clause which estimates the damages to be paid upon a breach.

The parties must then execute a Sales Agreement Public Deed before a notary to complete the transaction. The Sales Agreement Public
Deed will not alter the terms in the Promissory Sales Agreement, it is a legal formality required to transfer real estate.

Title will legally transfer once the Sales Agreement Public Deed has been registered in the land registration system.

18.6.1 Allocation of costs

The buyer usually pays for the registration fees (0.5% of purchase price) and the registration tax (0.5-1% of purchase price).

The parties usually share the notary fees, which will be roughly 0.3% of the purchase price.

The seller will be liable for capital gains tax, which may be due on the sale of any property which has been owned for more than two years.

18.7. Commercial leases

Parties are free to negotiate the terms of commercial leases. These are usually for two to five years, although the parties are free to agree any duration. It is customary to automatically extend the term unless a prior notice of termination is given.

18.7.1 Termination and right of tenant to demand extension

Commercial tenants acquire the right to extend a lease, and so are protected from termination, once they have been in a property for two years. After this period, the landlord can only terminate if:

- There is a need to repair or demolish the premises
- The tenant gives the property a different use from that agreed in the contract
- The landlord needs the premises for their own business, which must be substantially different from that of the tenant
- The tenant has committed a relevant breach of contract
18.7.2 Rent payments

Generally, rents are paid monthly in advance during the first five to 10 days of the month. Rents on rural real estates are usually paid yearly.

Landlords will commonly demand that tenants provide a performance bond through an insurance company for the payment of rent.

While it is possible to determine the value of rent in a foreign currency, the payment of the rent must be made in Colombian pesos.

18.7.3 Review of rents

In commercial leases, there are no legal limits on the size of rent increases. However, the applied rate is usually the increase in the consumer price index, sometimes increased by one or two points.

It is customary to agree a rent review mechanism in the lease agreement. Where the parties cannot agree rent increases, the rate will be determined by an expert independent third party.

18.7.4 Basic obligations of landlords and tenants

The landlord’s main obligations are to: (i) maintain the property so it can be used as agreed; (ii) protect the tenant from third parties who may disturb the tenancy; and (iii) pay for necessary structural repairs.

The tenant’s main obligations are to: (i) use the property according to the agreement, (ii) preserve the property; (iii) pay the rent on time; (iv) pay for public utilities; and (v) pay for ordinary repairs.

18.7.5 Subletting

Under commercial leases, tenants can sublet up to 50% of the leased premises without prior authorization from the landlord, provided the tenant does not give a different use to the property or use it in a way which adversely affects the landlord.

18.7.6 Insuring the leased premises

While neither party to a lease is obliged to insure the property, the landlord usually insures the leased premises.
18.7.7 Termination of the lease upon the sale of the premises

Where leases have been registered by public deed, a buyer will be obliged to recognize the rights of tenants and continue the lease. Tenants can also negotiate contractual protections which oblige the current owner to insist any buyer takes over the lease as part of a sale.

Where the lease has not been registered and there are no contractual protections, the lease may be terminated on the sale of the property.

18.8. Planning and environmental issues

All development needs to be authorized in accordance with official zoning plans. These plans set out the classification of land, the limits between urban areas and protected historic and cultural areas, and identify zones where construction is prohibited.

The zoning plans also contain environmental regulations which must be met. Environmental licenses or permits may need to be obtained before the undertaking of any construction or industrial activities.

18.9. Contact us

For further information or to discuss any investment or real estate transaction, please contact Alejandro Mesa:

Alejandro Mesa
+57 1 634 1551
alejandro.mesa@bakermckenzie.com
Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 65 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.