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Improvements in the Colombian regulatory framework for cross-border financial transactions

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During the past year Colombian regulators have made an effort to modernise the local regulatory framework in order to facilitate cross-border financial transactions with Colombian counterparties. Although there is some pending work to be done, the examples described below show that local regulators are working on a wise regulatory agenda that covers the migration to international regulatory standards, the strengthening of the infrastructure of the securities market for the purpose of integrating local and international capital markets, and the liberalisation of the investment regime of local institutional investors, which will facilitate the transfer of liquid resources to local and foreign issuers.

Migration to international regulatory standards

One of the most notable amendments to migrate to international regulatory standards occurred in the field of cross-border over-the-counter derivatives entered into by Colombian residents with foreign parties. Article 74 of Law 1328 of 2009 (Law 1328) adopted a netting legislation that creates a legal framework that allows foreign counterparties in OTC cross-border derivatives to exercise early termination rights, collect payments and enforce collateral when the Colombian counterparty enters into a bankruptcy or insolvency event.

In order to make the netting legislation apply to a particular transaction, the transaction will have to be registered in a system of operations in accordance with the regulations to be established by the national government.

The national government is also responsible for regulating the manner in which collat-

eral may be enforced without judicial intervention. Although the netting legislation adopted will not be in operation until the national government regulates the abovementioned issues, article 74 of Law 1328 was a great achievement for the OTC derivatives market, moving towards international standards. In fact, the only manner in which the netting legislation could be adopted was by a law enacted by the Colombian Congress, requiring a change to the traditional principles that govern both local bankruptcy laws and the enforcement of collateral.

It is remarkable that the message received from the regulator is the adoption of international regulatory standards to create a friendly legal environment for foreign investors, even in a field – principles of bankruptcy (par creditorum rule) and laws governing the enforcement of collateral – where Colombian law has traditionally been very protectionist. The netting legislation described above is a confirmation of the compromise for the internationalisation of local financial markets, which compromise has already been seen in exchange-traded and money-market transactions (repos, securities lending and simultaneous transactions).

Strengthening of the infrastructure of securities markets

Two important developments highlight the trend to integrate with foreign financial markets:

(i) on the one hand, the Colombian government and the Colombian stock exchange entered into a memorandum of understanding with foreign regulators and exchanges to integrate the Colombian, Peruvian and Chilean exchanges; and

(ii) pursuant to Decree 3886 of 2009 issued by the national government, foreign issuers may now list their securities to have them traded locally, without having to obtain a prior regulatory approval in Colombia. This special feature allows the creation of a secondary market in Colombia for foreign issuances of securities, reducing transactions costs for local investors and foreign issuers.

The securities that may be listed in local trading systems must be issued abroad pursuant to foreign regulations. The issuers may be multilateral financial institutions, foreign governments, foreign central banks or any other issuer, domiciled in Colombia or abroad, whose securities are registered or listed in a foreign exchange or foreign trading system of securities that is internationally recognised in the opinion of the Superintendence of Finance of Colombia (the SFC).

As mentioned above, the listing request must be performed by a local stock broker dealer, without having to obtain a prior registration or approval from the SFC. The clearance and settlement of the trades over the securities must be performed through local securities depository institutions, which must enter into an agreement with the foreign clearance and settlement institutions established abroad.

Only local professional investors are authorised to invest in foreign securities listed in a local trading system. Professional investors include, among others, all the entities subject to the surveillance of the SFC, such as the administrators of pension and severance payment funds, banks, insurance companies, trust companies, financial corporations and stock broker dealers.

The investments performed by local investors are characterised as investments in foreign financial assets and, therefore, the investments need to be channelled and registered with local foreign exchange authorities, in accordance with the applicable foreign exchange regulations.

Liberalisation of investment regimes

Finally, the local regulators are becoming more flexible with the investment regime of local investors. Such liberalisation facilitates the transfer of liquid resources to local and foreign issuers. We specifically refer herein to mandatory pension funds, which as of March 30 2010, have accumulated assets for Ps84.8 billion (\$46.5 billion approx.).

Currently, mandatory pension funds have one single investment regime determined by the National Government through the SFC. The current investment regime lists a number of registered assets and securities where mandatory pension funds may invest, subject to the compliance with certain regulatory and exposure limits.

Article 51 of Law 1328 established a multi-fund scheme, by instructing the national government to regulate the investment regime of mandatory pension funds based on different types and degrees of risk. This will allow the beneficiaries to choose among an aggressive, medium or conservative risk portfolio.

The purpose of the foregoing is obvious: the liberalisation of the investment regime of mandatory pension funds, so the fund administrators can set up different investment portfolios, with a different risk profile each. Although article 51 of Law 1328 seeks that the liquidity of mandatory pension funds is transferred to satisfy the financial needs of infrastructure projects and micro-credit activities, it is also expected that mandatory pension funds will be authorised to invest in riskier assets issued locally and internationally.

Banking and finance

Recommended firms

Tier 1

Baker & McKenzie
Brigard & Urrutia
Gómez-Pinzón Zuleta

Tier 2

Cárdenas & Cárdenas
Posse Herrera & Ruiz
Prieto & Carrizosa

Tier 3

Holguín Neira & Pombo
José Lloreda Camacho & Co
Rodríguez & Cavellier

Mergers and acquisitions

Recommended firms

Tier 1

Baker & McKenzie
Brigard & Urrutia
Prieto & Carrizosa

Tier 2

Cárdenas & Cárdenas
Gómez-Pinzón Zuleta
Posse Herrera & Ruiz

Tier 3

Holguín Neira & Pombo
José Lloreda Camacho & Co
Rodríguez & Cavellier

High-level elections in South America still cause foreign investors to hold their breath and cross their fingers, but few doubted the successor of Alvaro Uribe would deviate from the Colombian president's pro-investment economic course. Last June, Uribe's defence minister Juan Manuel Santos cruised into power with 70% of the vote, buoyed by several recent hostage rescues and the advice of American political strategist James Carville.

All signs are go for foreign investment in Colombia and everyone, from the smallest start-up to the largest international institutions, is descending on the nation looking for opportunities. In this limbo-land that is the developing world, global private-equity firms, local banks and multilateral lenders join to fund energy, infrastructure and microfinance ventures. One Colombian lawyer reported unprecedented interest in Colombia while attending last year's Global Private Equity Conference, jointly held by IFC and the Emerging Markets Private Equity Association. Another commentator described a traffic jam of private jets at Cartagena's airport during last April's World Economic Forum on Latin America, another telling sign that institutional investors are eager to secure a slice of the burgeoning market.

Leading lawyers say there are many factors behind Colombia's fertile investment climate. Perhaps the most significant catalyst is the financial system reform bill passed by congress in July 2009, which adds sophistication and flexibility to the pension fund system and allows greater participation of private-equity funds. The legislation also gives greater freedom to foreign banks and insurance companies operating locally and provides incentives for microfinance and financial cooperatives.

Before leaving office Uribe announced plans to open swaths of land and ocean territory to coal mining and hydrocarbon extraction, and recent exploration has proven as much as 1.6 billion barrels of oil lays

untapped in Colombia's borders. At the beginning of 2010 the government predicted \$10 billion would be invested in the energy industry over the course of the year. Still, the June 17 blast at the San Fernando coal mine that killed 70 miners highlights worker safety as a possible issue for project investors.

While the country is experiencing unprecedented growth, it still falls within the parameters of multilateral lenders to invest, and institutions like CAF, IDB and the World Bank are pledging funds while the window remains open. None is more active than IFC, which last June signed an unprecedented \$400 million deal with Bancolombia creating hedging instruments to support the market's new-found stability.

Baker & McKenzie

Able to draw on a strong roster of clients internationally, Baker & McKenzie has seen its level of activity rise with the incoming wave of foreign investment in Colombia. Competitors share esteem for partner Jaime Trujillo Caicedo as a talented and personable counterpart. As one peer says, "Jaime is top quality." The firm also earns marks for its active IP practice.

Clients praise Trujillo's US experience and ability to adapt foreign market concepts to local entities. An international client illustrates one example, explaining: "There was a lot of education, a lot of coaching and explaining to do - he had to translate a deal we are used to doing in US and Canada into a Colombian context."

One sector of investment Baker enjoys a strong showing in is fund work, where Trujillo has represented some important international wealth management firms. One key player is Canada's Public Sector Investment Board, or PSP Investments, which through a Colombian subsidiary invested \$50 million into Fondo de Capital Privado Fondo Inmobiliario Colombia, the largest investment by a non-Colombian entity into a local real-estate fund to date.

Trujillo also represents Brookfield Asset Management, another Canadian fund operator, in what is the largest private-equity infrastructure fund in Colombia. The fund achieved commitments from Colombia's major pension funds and other investors totalling \$320 million of the \$400 million fund.

Baker has also recently acted in some non-traditional M&A markets, including negotiations on behalf of television production company RTI for the sale of a 40% stake to Telemundo, an American-based Spanish language media producer and subsidiary of NBC and its parent company GE.

Leading lawyers

Alejandro C Mesa-Neira
Cristina Rueda
Jaime Trujillo Caicedo

Brigard & Urrutia

As the Colombian economy grows there is a perception among the nation's leading lawyers that Brigard & Urrutia is the firm that has best evolved to meet with the diverse needs of an increasingly sophisticated market. Peers hold that in recent years the firm has formed hyper-specialised practice groups in insolvency, competition and even entertainment law. Noting that Brigard admirably rode out the economic downturn and is enjoying a high level of success with its model, one rival says, "I have nothing but respect for that firm."

Partner Carlos Fradique-Méndez advised French food retailer Casino Group on the issuance of 30 million shares of local subsidiary, Colombia's largest retailer Almacenes Éxito. The \$188 million rights issue closed in December 2009 and allowed Éxito to consolidate its position in Colombia's retail market. Additionally, Fradique was selected to take Canadian oil producer Pacific Rubiales to the local market, making it the first foreign issuer listed on the Colombian stock exchange.

In addition to Fradique's work on the local exchange, partner Carlos Urrutia recently advised two transactions on international markets with Bank of America Merrill Lynch (BOA). The first was a \$500 million, 10-year bond for the public works company of Medellín, which will subsequently finance a water treatment plant, hydroelectric plants and wind farms. The firm again advised BOA on a \$450 million placement for Pacific Rubiales that expects growth in its oil production by as much as 500,000 barrels within the next four years.

The firm also participated locally in several worldwide mergers, representing Rio Tinto on its \$1.95 billion sale of packaging arm Alcan to Australian bottle and box manufacturer Amcor. Urrutia's team advised Disney on the Colombian aspects of their September 2009 acquisition of Marval comics, a transaction globally valued at \$4 billion in stock and cash.

Leading lawyers

Carlos C Fradique-Méndez
Sergio Michelsen Jaramillo
Carlos L Umaña Trujillo
Carlos Urrutia

Gómez-Pinzón Zuleta

With a reputation for aggressiveness preceding the 2008 acquisition of Zuleta & Partners,

Gómez-Pinzón brings an energy to the table that rivals say appeals to a certain segment of the customer base. "They are a bit dynamic - some of the more

Gómez-Pinzón particularly enjoys success with funds manager clients, who are increasingly active in Colombia's increasingly hospitable market. The firm represents international funds like Chile's Celfin and the US firm Darby Investments, as well as local players like Mercantil Colpatria. In 2009 a large group of the firm's attorneys advised the Colombian holding company's indirect acquisition of Citi's pension fund manager.

Partner Ricardo Fandiño de la Calle receives praise for his work on Colombia's vibrant capital markets. In August 2009 Fandiño and tax partner Mauricio Piñeros Perdomo advised Avianca in the issuance of bonds worth \$250 million. The overwhelming interest by investors contributed to the success of the Colombian airline's merger with Taca just two months later, during which Gómez-Pinzón also represented Avianca. Last year Fandiño's team advised EPM Telecomunicaciones, or UNE, in a \$150 million bond issuance that helped win a crucial bid for the nation's broadband spectrum rights.

In the energy sector Gómez-Pinzón has a valuable client in Isagen, a power company majority-owned by the Colombian government. Partners José Luis Suárez-Parra and Jorge Enrique Barón-Gómez led the team counselling Isagen in developing, financing and constructing a 820MW hydroelectric dam on the Sogamoso River in Santander. The government has authorised the company to seek financing for the estimated \$1.8 billion project.

Leading lawyers

Jorge Enrique Barón-Gómez
Ricardo Fandiño De La Calle
José Luis Suárez-Parra

Prieto & Carrizosa

The partners of Prieto are considered tough to a fault by competitors, who begrudge more than a little respect for lead corporate attorney Martín Acero. "His liability is that he's very difficult, but he's a good negotiator and at the same time a good tax guy," one peer explains.

The firm shows prowess representing international financial institutions in entering the local market through strategic acquisitions. Last March, Acero's team advised Bank of Nova Scotia's acquisition of Royal Bank of Scotland's wholesale banking operations in Colombia. The deal marks Scotiabank's debut in Colombia's direct banking market. Additionally, Acero counselled Goldman

Sachs in the \$200 million purchase of several coal mines through cash and an operational agreement with Coalcorp Mining, the seller.

A team of lawyers led by Juan Carlos Rocha represented the city of Cali's multi-utility company Emcali in the recapitalisation of its 240MW thermoelectric plant. The transaction, closed in June 2009, involved an international bidding process in which a consortium of Ashmore Colombia Infrastructure and Contour Global paid \$192 million for a 92% stake in Termoemcali. Through the deal, mandated by Colombia's Superintendence of Public Utilities, Emcali will be able to pay all its outstanding notes in full.

In 2009 partner Claudia Barrero's team was counsel for the buyer in power company ColInversiones's acquisition of a controlling interest in Empresa de Energía del Pacífico, or Epsa, from Spain's Gas Natural. The \$1.1 billion deal is one of the largest involving a publicly traded company in Colombia and displays the growing sophistication of the country's capital market.

Leading lawyers

Martín Acero
Claudia Barrero
Juan Carlos Rocha

Posse Herrera & Ruiz

With a recent flurry of activity in financing, mining, and energy transactions, competitors note Posse is definitely on the advance in the Colombian legal market. "I think they are moving up very fast and developing well," says one peer. In addition to its traditional clients in the natural resources sector, Posse holds important relationships with some of the most active multilateral lenders in the country, including CAF and IFC.

Last year the firm represented IFC in structuring and awarding a bid to develop the third section of Ruta Del Sol, a 665-mile highway connecting Bogotá to the northern coast. The project, estimated at a total cost of \$2.5 billion, is the second-largest infrastructure project in Latin America after the Panama Canal expansion. In late 2009 partner Mariana Posse advised CABEI on an ordinary bond issuance which brought in \$500 million and was oversubscribed by 3.5 times the offered amount.

The firm can also be found representing banks like BNP Paribas and ABN Amro in financing some of the most important infrastructure projects in Colombia. The firm is representing Citigroup through the structure of a securitised bond for Phase III of Transmilenio, Bogotá's mass transit system. The security involves the future flow of funds from the estimated \$890 million project.

Leading lawyers

Daniel Posse
Mariana Posse

Cárdenas & Cárdenas

Following a more conservative tack, The Cárdenas firm is known more for its quality than its omnipresence in large deals among Colombia's leading lawyers. "They are not interested in growth for growth's sake," remarks one rival, "they are interested in doing what they do well."

Senior corporate attorney Eduardo Cárdenas Caballero holds a reputation for knowing the issues facing foreign clients. As one client says: "He's well skilled with regards to taxation issues that a foreign company can face here." In December 2009 Eduardo Cárdenas helped electricity distributor Interconexión Eléctrica issue 32 million shares publically using a book building mechanism; only the third time such a structure has been used on the Colombian stock exchange.

Partner Bernardo P Cárdenas heads the firm's financial department, and in 2009 advised Pacific Rubiales subsidiary Oleoducto de los Llanos Orientales - a joint venture with Ecopetrol - in launching a \$260 million securitisation of profits derived from its operation of the pipeline between the Rubiales field and Ocesa pipeline.

Bernardo Cárdenas also worked on behalf of the lenders recently, representing a consortium of multilateral lenders including IFC, CAF and Germany's DEG in extending a \$150 million credit facility to Colinvertaciones to finance an expansion of the Termoflores gas-fired power plant to 610MW

Leading lawyers

Bernardo P Cárdenas
Eduardo Cárdenas Caballero