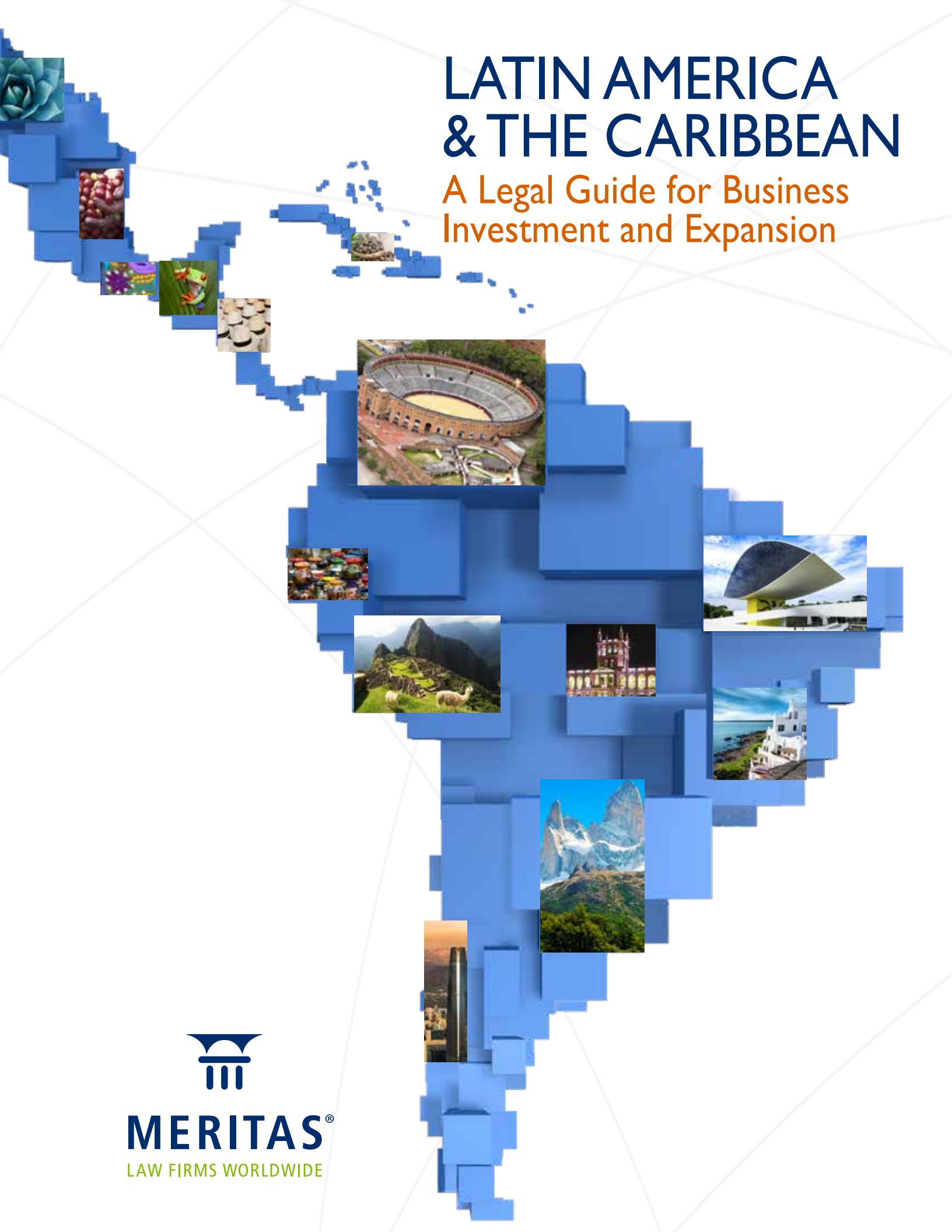


LATIN AMERICA & THE CARIBBEAN

A Legal Guide for Business
Investment and Expansion



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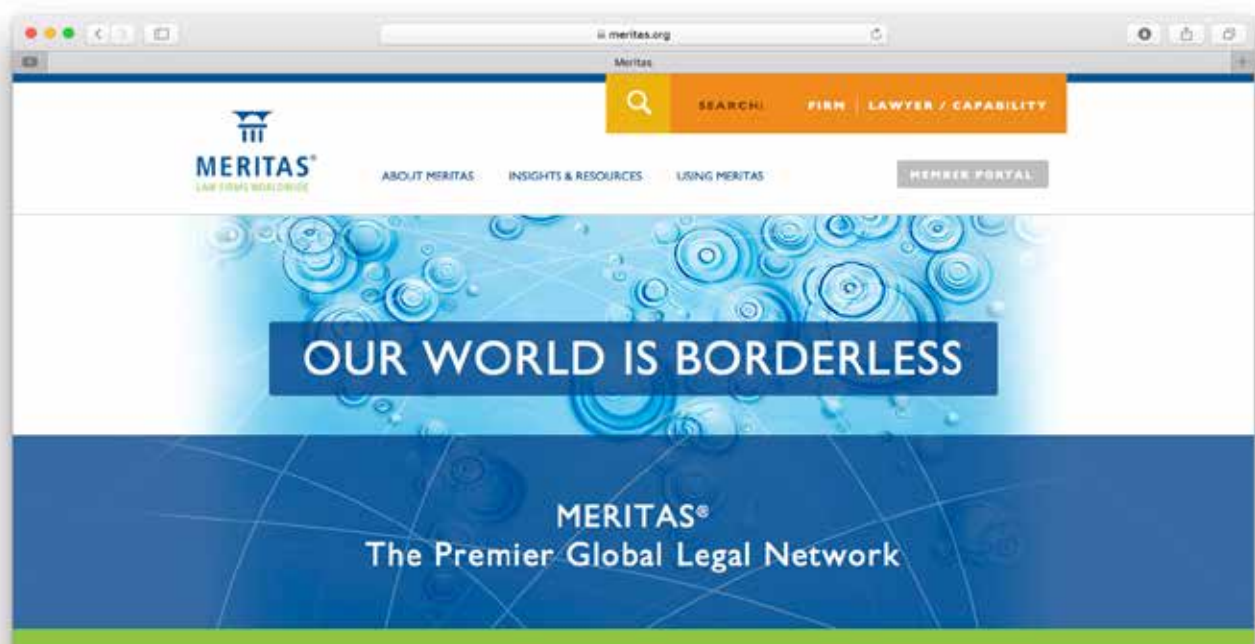
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COLOMBIA

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1. What role does the government of Colombia play in approving and regulating foreign direct investment?

Foreign direct investment (FDI) in Colombia is subject to registration with the Colombian Central Bank (*Banco de la República*). According to applicable foreign investment regulations, all foreign investments to be transferred into Colombian territory by a nonresident, are to be registered with the Central Bank through the filing of the corresponding foreign exchange information with a local financial institution.

In order to consider an operation as FDI, the Central Bank takes into account the date of the operation, the nonresident condition of the investor, if the contribution corresponds to any of the authorized modalities, and if the resources are effectively destined to the investment that is intended. The aforementioned conditions may need to be proved by the foreign investor, or any attorney in Colombia, to the control and surveillance entities whenever it is required.

The foreign investments that are addressed by the exchange regime and thus considered as foreign investment are: (i) the acquisition by a nonresident of the participations, shares and other kinds of contributions representing the capital of a Colombian company; (ii) the acquisition by a nonresident of the rights or participations in fiduciary businesses executed with fiduciary companies subject to the inspection and surveillance of the Colombian Financial Superintendence; (iii) the acquisition by a nonresident of real property, directly or through the execution of fiduciary business;

(iv) contributions made by a nonresident through acts or contracts, such as collaboration agreements, concession agreements, administrative services; (v) supplementary investments to the allocated capital of a branch; and (vi) the investments in private equity funds.

The adequate registration of FDI grants the investor a legal right to remit proceeds and other yields (i.e. dividends), derived from the investment, outside of Colombia. Additional rights include (i) reinvestment of all proceeds, if so desired by the investor; (ii) capitalization of investment proceeds, and (iii) remittance of investment sale proceeds or remaining funds after the local company is wound up or liquidated. The aforementioned rights may not be diminished or curtailed, except as a consequence of temporary measures adopted by the Central Bank or the government whenever the country's international reserves are reduced to less than three (3) months of imports. This event has not occurred since the exchange regime was liberalized in 1991.

2. Can foreign investors conduct business in Colombia without a local partner? If so, how does the Colombian government regulate commercial joint ventures between foreign investors and local firms?

Foreign investors are allowed to conduct business in Colombia without a local partner. In case the foreign investor chooses to begin a business relationship with a local partner, a joint venture can be used to establish

the contractual means of such enterprise. There is currently no specific governmental regulation for commercial joint ventures between foreign investors and local firms.

Taking into account the aforementioned, the most common corporate structure for joint ventures is the incorporation of new entities, jointly owned by the parties and whose rights and obligations are ruled by a shareholders agreement and the bylaws of the entity. In consequence, restrictions applicable to Colombian corporations must be taken into account at the moment of establishing a joint venture. As a general rule, shareholders agreements are accepted in Colombia; nonetheless, the same are subject to certain legal restrictions like the term of the agreement, which must not be longer than ten (10) years (it can be renewed every for equal terms indefinitely); or that there cannot be a restriction to the sale of the stock of a certain stockholder, other than those restrictions inherent to preemptive rights.

3. What laws influence the relationship between local agents and distributors and foreign companies?

The distribution of products between Colombian companies and foreign companies may be divided into two different categories: (i) supply agreements and (ii) commercial agency agreements. The classification of a commercial relationship in one or the other depends on the allocation of risks regarding slow moving inventory.

Thus, it will be considered a Supply Agreement if the agent has the property of the distributed goods after periodically purchasing them from the foreign manufacturer and the losses derived from slow moving inventory are supported by it. On the other hand, it will be considered a Commercial Agency Agreement if the agent sells the products on the occasion of a promotion activity of the products and losses derived from slow moving inventory are supported by the manufacturer.

Losses may be supported by manufacturer through different mechanisms, including return policies or buy-back clauses for unsold products triggered after a determined period of time.

Supply agreements are regulated, in first place, by clauses agreed in the corresponding agreement, and alternatively by provisions set forth in Articles 968 to 980 of the Code of Commerce.

Commercial agency agreements are regulated, in first place, by clauses agreed in the corresponding agreement, and alternatively by provisions set forth in Articles 1317 to 1331 of the Code of Commerce. Among them, Article 1328, regarding application of Colombian law as law of contract, is mandatory and any clause agreed otherwise will be considered as “non-written”.

It is important to mention that interpretation of Article 1324 was modified by the Supreme Court of Justice through ruling dated October 19, 2011. In this decision it was stated that “commercial severance payment”, set forth in Article 1324 and equivalent to the twelfth part of the average commission, royalty or profit earned during the last three years, multiplied by the number of years of duration of the agreement, may be waived by the parties if it is agreed in the agreement.

4. How does the Colombian government regulate proposed merger and acquisition activities by foreign investors and are there any areas of the economy where they are prohibited?

The cornerstone principle of foreign investment regulations in Colombia is the nondiscrimination of the foreign investor vis-à-vis national investors (and vice-versa); hence, there is no specific regulation to merger and acquisition activities by foreign investors. By and large, foreign investment is permitted in all economic sectors except for i) the national defense industry, and ii) the processing or disposal of hazardous waste not produced in Colombia. In addition, there are limitations applicable to oil and gas, financial, open television, and private security and surveillance sectors.

In addition, the Superintendence of Industry and Commerce is the National Antitrust Authority since Law 1340 came into force; therefore this entity has exclusive competence regarding the review and antitrust clearance of mergers, acquisitions and other types of business integrations. However, there are two exceptions for antitrust clearance which are: (i) mergers related to banking or financial entities, in this case the branch that has authority is the Financial Superintendence, and, (ii) business integrations related to aircraft operators such as codeshare agreements, joint development in chartering aircraft, sharing and blocking space on aircraft; for this sector the competent authority is the Civil Aeronautics Board (Aeronautica Civil).

Branches dedicated to oil and mining activities and related services have a special regime whereby they have no obligation to repatriate into Colombia any revenues obtained from their activity. This means that they are able to keep abroad such funds without bringing them into the country. On the other side these types of branches have no access to the foreign exchange market, and thus cannot access foreign indebtedness operations or financing for imports.

There are screening laws applicable to foreign direct investment in the financial and insurance industry. An investment in more than 10% of the outstanding voting stock of an

institution under surveillance from the Colombian Financial Superintendence (CFS) requires prior approval of the CFS. This approval may not be denied provided the investment “promotes public welfare, and that investor duly credits its moral and financial solvency” as such is ascertained by the CFS.

5. **How do labor statutes regulate the treatment of local employees and expatriate workers?**

In Colombia, due to the principle of equal rights and obligations between foreigners and nationals established in the Colombian Constitution and Labor Code, the treatment of local and expatriate employees must be the same. Expatriate employees and local employees are entitled to the same rights, benefits and social security coverage. According to our territoriality principle, the Colombian Labor Code is applicable to all employment relationships performed within the Colombian territory, regardless of the nationality of the parties involved.

Under Colombian labor law, employment agreements can be entered into verbally or in writing, and are classified depending on their duration. Employment agreements can be executed for a fixed period, for the duration of the execution of a particular work, indefinitely or to run an occasional, accidental or temporary job.

However, foreigners that come to Colombia for employment purposes have to obtain a visa that enables them to work. Furthermore, in the event that the foreigners exercise a regulated profession they must have a professional license or permit.

All the employees in Colombia have the right to earn a salary in compensation for the services rendered. The ordinary regular salary is the basic remuneration settled by the parties, in money or in kind. This salary can be freely agreed to by the parties but always bearing in mind the legal minimum wage, which for the year 2017 is the sum COP737,717 (approximately USD254, with a conversion rate equivalent to a USD = COP2,900). Generally speaking, employees earning a regular salary are entitled to mandatory fringe benefits plus the payment of overtime, surcharges for night work or work on Sundays and holidays and vacations. Notwithstanding the above, in Colombia there is the possibility for employees earning thirteen (13) legal minimum wages or more, to earn an all-inclusive salary which compensates in advance all the mandatory fringe benefits, surcharges and payments for overtime and night work and work on Sundays and holidays (without including vacations).

6. **How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?**

Financial transactions in Colombia involving foreign exchange and international investments are subject to general exchange principles, established by Law 9 of 1991 and Resolution 08 of 2000 issued by the Board of Directors of Colombian Central Bank.

Pursuant to Resolution 08 of 2000 there are two sectors within the market for foreign currency: (i) all currencies that must be channeled through authorized intermediaries; and (ii) the currencies that are exempt from this obligation but which voluntarily comply. Under Colombian foreign exchange regulations, foreign exchange intermediaries are authorized to enter into foreign exchange transactions to convert foreign currencies into Colombian Pesos or Colombian pesos into foreign currencies.

Local banks are entitled to act as authorized exchange intermediaries according to exchange and international investment regulations in Colombia. Besides, among other functions banks are authorized to (i) sell and buy bills of exchange and currencies; (ii) issue letters of credit; and (iii) act as a transfer agent of any person and as such, receive and deliver funds, transfer, register and endorse titles of shares, bonds or other debt instruments.

Please bear in mind that the Colombian government and the Colombian Central Bank may also limit the remittance of dividends and/or investments of foreign currency received by Colombian residents whenever the international reserves fall below an amount equal to three months of imports. Also, although the Colombian peso is allowed to float freely, the Colombian Central Bank or the Colombian government may intervene in the exchange market.

7. What types of taxes, duties, and levies should a foreign investor in Colombia expect to encounter?

Any foreign investor will encounter the same taxes that any other Colombian individual faces:

Corporate Income Tax: is levied on profits which increase the taxpayers' equity and are derived from its ordinary economic activities. For 2017, the effective income tax rate for corporations and other legal entities may rise to 40%, for 2018 to 37% and from 2019 and so on, 33%.

Income Tax for Individuals: incomes must be sorted in five (5) schedules according to its nature, and then grouped in three (3) groups to determine the applicable income tax rate. These groups are: i) Labor and pension income (rate: 0 – 33%); ii) Capital and non-labor income (0 – 35%); and iii) dividends and profits income (0 – 10% to local tax residents); dividend tax for non-Colombian tax residents is 5%.

Capital Gains Tax: applies on profits which are not related to the taxpayer's ordinary economic activity. Capital gains are expressly defined by law. The applicable tax rate is, at general rule, 10%.

Value Added Tax: sales, services and imports are subject to VAT. The general VAT rate outside free trade zones is 19%. The general rate is subject to exceptions with respect to specific goods or services as provided by tax regulation.

Financial Transactions Tax: certain financial transactions are subject to the financial transactions tax, calculated at a rate of 0.4% on the amount of the transaction. As of year 2019 such rate will be progressively reduced, reaching a 0% level by year 2022.

8. How comprehensive are the intellectual property laws of Colombia, and do the local courts and tribunals enforce these laws regardless of the nationality of the parties?

Intellectual property laws of Colombia are comprehensive. Bolivia, Colombia, Ecuador and Peru share the same Intellectual Property regime and legislation issued by the Commission of the Andean Community. These laws (also known as Decisions) are supranational, of direct effect and immediate implementation. They are nationally binding and all authorities, courts and tribunals alike, enforce them regardless of the nationality of the parties.

9. If a commercial dispute arises, will local courts or will international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

Either forum may be more beneficial to foreign investors depending on, inter alia, the amount in dispute, the infrastructure of the foreign investor in Colombia, its position within the dispute (claimant or defendant), the location of its assets, the subject matter of the dispute, etc..

The Colombian procedural law aims to guarantee that all judgements are rendered in accordance with the due process rights and by an independent and impartial judge. However, the neutral character of international arbitration, which goes beyond the independence and impartiality, might be more advantageous to the foreign investors, at least as a matter of perspective. For instance, the neutral nationality of the arbitrators creates a sort of presumption that they are less likely to share an idiosyncrasy or common values with either party. In the same vein, the possibility for the parties to agree on a neutral seat of arbitration, on the law applicable to the subject matter of the dispute, on the language of the proceedings, and so on, might inspire more confidence on the foreign investors.

The need for expertise on certain complex or highly specialized subject matters might influence the choice of international arbitration over local courts. On the contrary, for disputes that do not require such specialization, the choice of international arbitration might be costly and inconvenient.

Concerning the enforcement, the enforcement of a foreign arbitral award takes more time than the enforcement of a national judgment. Indeed, article 111(3) of the Law 1563 of 2012 states that, for the enforcement of foreign arbitral awards, it is necessary to consider its prior recognition, which might take approximately two to three years. However, foreign awards are not subject to the ordinary and extraordinary motions available to challenge national judgement (annulment and revision).

In conclusion, the choice of the most beneficial forum for disputes resolution depends on several factors that must be assessed on a case-by-case basis.

10. What advice can you provide for how best to negotiate or conduct business in Colombia?

The decision to best conduct business in Colombia depends on a variety of factors. Colombia is a country open to foreign investment; however, professional legal advice should be sought out in order to establish business relationships in Colombia, all the more if foreign investment is involved. Depending on the industry that pertains to the business that is to be established, a thorough study of the regulations applicable to that industry is recommended before any investment activity is performed. Furthermore, legal advice is recommended to determine, among others, (i) the business entity that may have to be created, (ii) tax regime applicable to said entity with its pros/cons, (iii) mechanism to hire employees and/or independent contractors, etc.

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