ICLG

The International Comparative Legal Guide to:

Private Equity 2017

3rd Edition

A practical cross-border insight into private equity

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co
Advokatfirman Törngren Magnell
Ali Budiardjo, Nugroho, Reksodiputro
Allen & Gledhill LLP
Angola Capital Partners
Ashurst Hong Kong
Atanaskovic Hartnell
Bär & Karrer Ltd.
Borenius Attorneys Ltd
British Private Equity & Venture Capital Association
Cox Hallett Wilkinson Limited
Dentons
Fried, Frank, Harris, Shriver & Jacobson LLP
GTs Advocates LLP
Houthoff Buruma
Lloreda Camacho & Co.
Matheson
McMillan LLP
Memminger LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Pinheiro Neto Advogados
Samvād: Partners
Schindler Attorneys
Schulte Roth & Zabel LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Tomashevskaya & Partners
Triay & Triay
Udo Udoma & Belo-Osagie
VdA Vieira de Almeida
Webber Wentzel
Zhong Lun Law Firm

Contributing Editors
Lorenzo Corte & Lutz Zimmer, Skadden, Arps, Slate, Meagher & Flom LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Paul Mochalski

Sub Editor
Oliver Chang

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
May 2017

Copyright © 2017
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-54-3
ISSN 2058-1823

Strategic Partners

General Chapters:

1	**What's in Store for PE in 2017, Trends and Practices** – Sandro de Bernardini & Stephen Sims, Skadden, Arps, Slate, Meagher & Flom LLP	1
2	**Private Equity Transactions in the UK: the Essential Differences from the U.S. Market** – Nicholas Plant, Dentons	3
3	**Reallocating Risk: An Introduction to Warranty and Indemnity Insurance in UK Private Equity Transactions** – Dan Oates & Hannah Luqmani, Fried, Frank, Harris, Shriver & Jacobson LLP	6
4	**International Standard Setting Bodies and the Global Regulatory Agenda** – Michael Johnson, British Private Equity & Venture Capital Association (BVCA)	12

Country Question and Answer Chapters:

5	**Angola**	VdA Vieira de Almeida and Angola Capital Partners: Hugo Moredo Santos & Rui Madeira	18
6	**Australia**	Atanaskovic Hartnell: Lawson Jepps & Jon Skene	25
7	**Austria**	Schindler Attorneys: Florian Philipp Cvak & Clemens Philipp Schindler	34
8	**Bermuda**	Cox Hallett Wilkinson Limited: Natalie Neto	43
9	**Brazil**	Pinheiro Neto Advogados: Eduardo H. Paoliello Jr.	49
10	**Canada**	McMillan LLP: Michael P. Whitcombe & Brett Stewart	56
11	**China**	Zhong Lun Law Firm: Lefan Gong & David Xu (Xu Shiduo)	63
12	**Colombia**	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	72
13	**Finland**	Borenius Attorneys Ltd: Johannes Piha & Johan Roman	79
14	**Germany**	Memminger LLP: Peter Memminger & Tobias Reiser	86
15	**Gibraltar**	Triay & Triay: F. Javier Triay & Jay Gomez	93
16	**Hong Kong**	Ashurst Hong Kong: Joshua Cole	100
17	**India**	Samvād: Partners: Vineetha M.G. & Ashwini Vittalachar	105
18	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Freddy Karyadi & Anastasia Irawati	115
19	**Ireland**	Matheson: Éanna Mellett & Aidan Fahy	122
20	**Mongolia**	GTs Advocates LLP: Zoljargal Dashnyam & Enkhsaruul Jargalsaikhan	130
21	**Netherlands**	Houthoff Buruma: Alexander J. Kaarls & Vivian A. L. van de Haterd	138
22	**Nigeria**	Udo Udoma & Belo-Osagie: Folake Elias-Adebowale & Christine Sijuwade	147
23	**Norway**	Aabø-Evensen & Co: Ole Kristian Aabø-Evensen & Harald Blaauw	154
24	**Portugal**	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Ricardo Andrade Amaro & Pedro Capitão Barbosa	174
25	**Russia**	Tomashevskaya & Partners: Zhanna Tomashevskaya & Roman Nikolaev	181
26	**Singapore**	Allen & Gledhill LLP: Christian Chin & Lee Kee Yeng	191
27	**South Africa**	Webber Wentzel: Nicole Paige & Andrew Westwood	198
28	**Sweden**	Advokatfirman Törngren Magnell: Anett Lilliehöök & Sten Hedbäck	207
29	**Switzerland**	Bär & Karrer Ltd.: Dr. Christoph Neeracher & Dr. Luca Jagmetti	215
30	**United Kingdom**	Skadden, Arps, Slate, Meagher & Flom LLP: Lorenzo Corte & Sandro de Bernardini	223
31	**USA**	Schulte Roth & Zabel LLP: Peter Jonathan Halasz & Richard A. Presutti	232

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to give comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Colombia

Santiago Gutiérrez

Lloreda Camacho & Co.

Juan Sebastián Peredo

1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

For the last few years, the Colombian private equity ("PE") market has experienced significant growth. Most of the traditional strategies to acquire portfolio companies are used in Colombia. Mainly, the market has seen significant moves in terms of venture capital investments, growth capital investments, buyout transactions and turnaround transactions. The Colombian PE market has also grown in the amount of transactions involving turnarounds.

In contrast, given the nature of the PE market in Colombia, club deals have not been a traditional type of transaction.

1.2 What are the most significant factors or developments encouraging or inhibiting private equity transactions in your jurisdiction?

PE transactions have been continuously growing in Colombia as a consequence of a sound and healthy economy. Colombia has been committed to stimulating investment into the country through investment protection treaties, free trade agreements and double taxation agreements, among other measures. Moreover, the particular tax regime applicable to PE funds is appealing for investor interest in the PE market.

Nevertheless, among the transaction structures, IPO exits are still rare, considering that the Colombian capital market is still developing.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction? Have new structures increasingly developed (e.g. minority investments)?

Usually, PE funds investing or acquiring Colombian portfolio companies set up a special purpose vehicle ("NewCo") in Colombia to effect the investment or acquisition. For this purpose, onshore and offshore structures are available and have been used for PE transactions.

There has not been a significant development of new structures and it is not a common practice for PE funds to take minority positions.

2.2 What are the main drivers for these acquisition structures?

A number of factors determine the acquisition structure including, among others, tax considerations (tax efficient repatriation of dividends), governance structure, limitation of liability, business continuity, regulatory requirements and protection of assets.

Nevertheless, the primary driver for selecting the structure is tax-driven. The PE fund must consider upstream and downstream issues when structuring the transaction and deciding on an onshore or offshore structure.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

Traditionally, the equity composition of the Colombian NewCo will only have one class of shares, as the NewCo will only be a vehicle with a majority shareholding for the PE fund.

Carried interest and other remuneration schemes are usually found within international standards. Such carried interest is paid as a PE fund cost and, therefore, usually not a part of the NewCo structure.

2.4 What are the main drivers for these equity structures?

Typically, the drivers in the selection of the equity structure will be structural subordination, ease of return of funds and tax considerations. Nevertheless, the structure will also have to consider the balance of aligning the interest of the shareholders and stimulating management.

As with structuring acquisition transactions, the primary driver is tax efficiency and an effective exit strategy.

2.5 In relation to management equity, what are the typical vesting and compulsory acquisition provisions?

In Colombia, such type of provisions may be found, in different versions, in the investment protocol of the PE fund. Likewise, at the level of the portfolio company there is room for vesting and compulsory acquisition provisions (e.g. acquiring shares at par value); however, these are rare.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

2.6 If a private equity investor is taking a minority position, are there different structuring considerations?

In Colombia, a minority position would not substantially change the structure of the transaction, taking into account that the primary driver for selecting such structure is tax-driven. Moreover, it is not common for PE funds to take minority positions in portfolio companies. Therefore, the structure would be generally similar and, probably, with some precisions in terms of the negotiation of a shareholder agreement at the portfolio company level, mainly aimed at protecting minority rights.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

There are various mechanisms that can be used for the purposes of arranging proper corporate governance in the portfolio companies. However, typically, corporate governance will be addressed through the shareholders' agreement, which will contain provisions regarding corporate governance. Likewise, corporate governance is addressed through amendments to the articles of association of the portfolio company.

Shareholders' agreements are not required to be made publicly available. Nevertheless, if corporate governance issues are faced through the introduction of amendments to the articles of association of the portfolio company, such amendments will be made publicly available by means of formalising the amendment through a public deed (not required for all types of vehicles) and registering the public deed with the chamber of commerce.

3.2 Do private equity investors and/or their director nominees typically enjoy significant veto rights over major corporate actions (such as acquisitions and disposals, litigation, indebtedness, changing the nature of the business, business plans and strategy, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

PE funds customarily include a list of reserved matters in the shareholders' agreement of portfolio companies. Such reserved matters are also addressed through the introduction of amendments to the articles of association of the portfolio companies which, in turn, will include specific rules regarding decision-making at a shareholders' level and board of directors' level.

Veto rights introduced in the shareholders' agreements usually address issues regarding, *inter alia*, changes in the nature of the business, amendments to the articles of association, changes of legal form, mergers and acquisitions, changes in the capitalisation of the portfolio company, signing of material contracts, indebtedness, liens or charges, liquidation and dissolution, and related parties' transactions.

These veto rights will provide the PE fund with control over the portfolio company's major commercial, corporate, investment and legal decisions.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

Veto arrangements may be introduced in different manners, among which can be found: an obligation to vote in a determined manner; higher quorums for decision making; among others.

Nevertheless, veto rights cannot be exercised in relation with the distribution of dividends.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

Minority shareholders are not entitled to special prerogatives different from those established for majority shareholders; unless the majority shareholders use its decision power to jeopardise the rights of the minority shareholders (e.g. their right to receive dividends).

As a general rule, each shareholder/owner of ordinary shares will be entitled to: attend the shareholders meetings; receive profits in the proportion of its holding in the aggregate; and review the corporate information within the 15 working days previous to the shareholders ordinary meeting.

The protection of minority shareholders has been developed in Colombia through the binding decisions of judicial courts – mainly the Superintendence of Companies acting as a judicial authority, as a development of the good faith principle. In accordance with the judicial precedents regarding this matter, the majority shareholder shall act and decide in the best interests of the company and its stockholders, and not base those decisions on personal interests. In case a court considers that the decision was taken abusing the minority shareholders' rights, the minority shareholders will be entitled to claim damages, regardless of the fact that the decision may be upheld by the court.

However, under Colombian law minorities also have to act in good faith and face limitations in order to prevent the abuse of their rights.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

Shareholders' agreements are typically governed by Colombian law. The parties are free to determine the extent and scope of the shareholders' agreement. In principle, shareholders' agreements are enforceable and binding only between the contracting parties. However, pursuant to Colombian corporate law, shareholders' agreements with respect to simplified corporations (*sociedades por acciones simplificadas*) – a type of corporation commonly used for these transactions – will be valid without limitations if the agreement is deposited with the portfolio company.

Pursuant to recent resolutions issued by the Superintendence of Industry and Commerce – the Colombian competition authority – non-compete provisions and non-solicit provisions in M&A transactions are not, *per se*, prohibited or considered as restrictive of competition. The provision must be reviewed on a case-by-case basis.

Moreover, any provision of the shareholders' agreement that is contrary to the articles of association in relation with preference rights in the allocation and sale of shares, would be deemed null and void.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies under corporate law and also more generally under other applicable laws (see section 10 below)?

Under Colombian law, nominees to the board of portfolio companies are jointly and severally liable (along with other directors) *vis-à-vis* the portfolio company, its shareholders and third parties, for damages caused due to their wilful misconduct or gross negligence. In such cases, there is no limitation as to the damages that can be claimed.

Moreover, PE investors of portfolio companies may be held liable for the same reasons explained above (wilful misconduct and gross negligence in their decision-making capacity), in the event that their decision-making actions cause damages to the portfolio company, other shareholders or third parties. Likewise, under Colombian corporate law, entities that have a control of Colombian portfolio companies may be held liable in the event the Colombian portfolio company is declared insolvent.

As a restriction, PE investors nominating directors to the board of listed portfolio companies, have to take into account that at least 25% of the directors must be independent.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

Colombian corporate law establish that directors shall act in good faith, loyalty and with the diligence of a good businessperson. Directors are obliged to refrain from participating, directly or indirectly, either for their personal interest or for that of third parties, in any activities that may imply unlawful competition with the portfolio company or that may give rise to a conflict of interest, unless there is a prior authorisation of the shareholder.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including competition and other regulatory approval requirements, disclosure obligations and financing issues?

One of the major issues that impact the timetable for transactions is antitrust clearance. As a general rule, only the companies that meet the regulatory thresholds (jointly or individually obtained an operational revenue and/or assets in excess of about USD 14M during 2017) and engage in the same economic activity or participate in the same value chain, are required to notify the Superintendence of Industry and Commerce about the intended operation in the event of merger, consolidation, acquisition of control or integration. Any kind of transaction where the jurisdictional thresholds are met, and where the undertakings will cease to compete in the market and will be controlled permanently by the same parent entity, will be caught under merger control regulations.

Apart from antitrust clearance, PE transactions in Colombia are not subject, in principle, to regulatory approvals from Colombian authorities. Specific approvals may have to be obtained when the portfolio company pertains to a specific sector that requires prior consent from the relevant authority (e.g. financial institutions).

In both cases, consent from authorities could take several months and would be a factor to weigh-in when determining the structure of the transaction.

4.2 Have there been any discernible trends in transaction terms over recent years?

As the PE market has been evolving in Colombia over recent years, certain trends have also emerged, such as: extensive sellers' due diligence and vendors' due diligence; the inclusion of different compensation mechanisms for management; and the inclusion of more complex earn-out mechanisms being more commonly used. Escrow structures for protection in relation with claims in respect of representations and warranties are also more commonly used in PE transactions.

In terms of exit structures, it is still not common to find exits through listing in Colombia.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

Public-to-private transactions are not common in Colombia. Nevertheless, a takeover of a listed company and its delisting is highly regulated in Colombia. A public-to-private transaction would involve, in the first place, a tender offer aimed at obtaining control of the portfolio company. Such tender offer would have to comply with certain requirements and conditions, which in turn would affect the timeframe of the transaction, as follows: (i) prior authorisation from the Colombian Superintendence of Finance; (ii) publication of the offer; and (iii) a period to receive the acceptance to the offer (a minimum of 10 and a maximum of 30 business days).

In terms of financing, it is mandatory to obtain the committed funding before launching the tender offer (the bidder must also provide a guarantee to cover a percentage of the transaction).

After obtaining control of the company through the tender offer, the bidder (now shareholder) would be able to request the delisting of the company by means of obtaining the favourable vote of the majority of shareholders. For purposes of protecting the shareholders who voted against delisting and those who did not attend the shareholders' meeting, the shareholders that voted in favour of delisting the company are obliged to launch a tender offer addressed to these shareholders.

5.2 Are break-up fees available in your jurisdiction in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs? If so, are such arrangements frequently agreed and what is the general range of such break-up fees?

In general, break-up fees would not be permitted in Colombia, if the agreement or provision obstructs the right of the shareholders to accept competing tender offers by third parties. Nevertheless, the Superintendence of Finance in Colombia, when consulted on the matter, has not been reluctant to accepting break-up fees when the shareholders are permitted to sell, and end up selling their shares, to a competing bidder.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

Typically, "locked-box" structures are preferred for PE sellers, taking into account that the seller will have certainty as to the purchase price. However, on the buy-side "completion accounts" structures are preferred as they provide adjustment mechanisms when the execution date and closing date are expected to be far apart. Adjustments under this structure are usually referred to the net cash debt/ position and working capital.

The consideration structure often involves earn-out mechanisms to stimulate management.

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

PE sellers in Colombia do not regularly provide extensive warranties and indemnities. Frequently, these are limited to fundamental warranties (title to its own shares, capacity and authority). Business warranties are not common and, if included, are provided by the management and not the PE seller. In this sense, buyers have to rely on their due diligence.

Nevertheless, additional warranties and indemnities can be seen, depending on the bargaining power of the buyer. However, this would reflect on contingent liabilities that are commonly addressed through escrow arrangements.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

Parties typically agree on non-compete and non-solicitation obligations. The survival period for these obligations may vary but usually range between three and five years. However, PE sellers are usually reluctant to provide such covenants and, if agreed upon, are part of the negotiation.

6.4 Is warranty and indemnity insurance used to "bridge the gap" where only limited warranties are given by the private equity seller and is it common for this to be offered by private equity sellers as part of the sales process? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such warranty and indemnity insurance policies?

To our knowledge, Colombian insurance companies are not offering warranty and indemnity insurance.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

Typically, PE sellers will include several limitations from its potential liability arising from warranties and indemnities. Such limitations often include: (i) a *de minimis* threshold (excluding claims below the limit); (ii) a basket (for aggregate claims); and (iii) a cap on the total liability.

Likewise, PE sellers will include time limitations on the survival of the indemnification, ranging from one to three years and in certain cases (usually labour and tax-related claims) the statute of limitation is accepted.

Finally, PE sellers will often try to exclude certain claims and to limit the indemnification to direct losses.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

As a general rule, PE sellers do not provide security for any warranties and liabilities. However, PE buyers often require some sort of security to collateralise warranties and liabilities from sellers (not often from the management team). This security is often granted in the form of escrow arrangements.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain if commitments to, or obtained by, an SPV are not complied with (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Usually financing is guaranteed by the PE fund and no further documentation is required from the sellers. In case the PE fund is the seller, some sort of comfort is required from the potential beneficial owners of the buyer (i.e. representations as to securing the funds or a guarantee).

If financing is to be provided by third parties (e.g. banks), the representations and warranties will often include the terms and status of the arrangements.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are not prevalent in PE transactions in Colombia and are relatively unusual. However, exclusivity clauses in the memorandum of understanding are usual (including clauses providing for damages if exclusivity is breached).

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

The main challenge that a PE seller will face when considering an IPO exit is related with cost and timing. Costs of an IPO exit are higher than the cost of a traditional sale to other investors or other PE funds. Moreover, the timing to list the portfolio company (including regulatory approvals) is significantly higher.

Likewise, an IPO exit will entail subjecting the portfolio company to the regulation applicable to listed companies. As with most jurisdictions, this regulation includes obligations regarding *ad hoc* reporting, financial reporting and corporate governance, among others.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Finally, the Colombian market for listed companies is still developing and, therefore, PE sellers could face the market risk of offering the shares through an IPO. This would entail significant efforts in terms of road shows and market analysis.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

As mentioned, IPO exit strategies are not common in the Colombian PE market as the market is still developing. Therefore, there are no customary lock-up periods that have been developed for IPO exits.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

PE sellers do not generally pursue a dual-track exit process. IPO exit strategies are unusual in Colombia. Exit strategies in Colombia are usually the sale to new investors or to PE funds.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

Typically, in leveraged buyouts, traditional bank-led loan financing is used in mid and large PE transactions. Loans may take the form of term loans, in its majority, or revolving credit facilities. Likewise, leveraged buyouts will traditionally contain several layers of debt. For mid and large PE transactions, syndicated loans, both with local and international banks are common.

High-yield bond financing has not taken an important role in PE transactions and, therefore, bank loans continue to be the predominant source of funds. We expect an increase in the use of high-yield bond financing for large PE transactions.

We have not seen significant transactions funded through non-bank alternatives.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

In general, we do not have particular limitations that affect the structure of debt financing of PE transactions in Colombia.

Colombian banks are permitted to grant facilities for PE transactions, so long as the transaction does not involve taking control of entities under the surveillance of the Colombian Superintendence of Finance. This general rule is subject to certain exceptions.

Some limitations may be applicable in relation to the tax treatment of the financing, taking into account thin capitalisation rules and transfer pricing rules.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

Key tax considerations in Colombia include:

(i) PE funds are not considered tax payers for income tax purposes; however, the remuneration received by the fund manager, constitute taxable income for the administrator subject to withholding tax.

(ii) Under the so-called “transparency principle”, the income received by the PE fund is distributed to the PE investors as if received directly by them.

(iii) Tax dividend distributions will be taxed if the PE investor is a resident individual, a foreign entity or a nonresident individual.

(iv) Double taxation treaties are used for purposes of off-shore structures. Currently there are treaties in force aimed at avoiding double taxation with Spain, Switzerland, Chile, Canada, Mexico, Portugal, India, South Korea and the Czech Republic. Additionally, there is a Decision of the Andean Community (CAN) that can be used as a mechanism to avoid that applying to payments made to Ecuador, Peru and Bolivia.

(v) The fund manager must act as withholding agent when distributing the profits of the PE fund to the PE investors.

Off-shore structures are common in PE transactions in Colombia.

9.2 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

Income tax or capital gain tax is levied over the gains in share and asset transfers. These gains would be equivalent to the difference between the fiscal cost of the shares or assets and the transfer price. For tax purposes, the transfer price between unrelated parties cannot differ by more than 25% from the market value, and in the case of shares of non-listed companies, the commercial value corresponds to at least to 115% of the intrinsic value of the shares.

If the shares were held for more than two years, capital gains tax over its profits will be 10%. Otherwise, (if shares were held for less than two years) the profits are taxed with income tax at the rate determined on a yearly basis, which for 2017 is 40% (the 34% income tax rate plus a 6% surcharge).

9.3 What are the key tax-efficient arrangements that are typically considered by management teams in private equity portfolio companies (such as growth shares, deferred / vesting arrangements, “entrepreneurs’ relief” or “employee shareholder status” in the UK)?

The most common arrangements for tax-efficient purposes in Colombia are stock purchase plans (stock options) deferred in time.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

Colombia adopted a tax reform in December 2016 that has an indirect impact in PE transactions. Fundamental matters, such as the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

transparency principle" have not been modified. However, tax on dividends entails new challenges when structuring PE transactions.

10 Legal and Regulatory Matters

10.1 What are the key laws and regulations affecting private equity investors and transactions in your jurisdiction, including those that impact private equity transactions differently to other types of transaction?

In general, PE transactions are governed by the provisions of the Colombian Code of Commerce, with regard to the governance and operation of portfolio companies and the general legal framework for equity and acquisition transactions.

Law 964 of 2005 and Decree 2555 of 2010 shall apply with regard to the incorporation and operation of PE funds (*fondos de capital privado*), for tender offers and, in general, for the governance and the operation of listed portfolio companies.

The key regulation that impacts PE transactions differently than other types of transactions is Decree 2555 of 2010, as it establishes the legal regime for the incorporation and operation of PE funds (*fondos de capital privado*) in Colombia. This is a special type of vehicle created for raising funds for the purposes of PE transactions, and it especially permits raising funds from pension funds that otherwise would not be permitted to carry PE transactions.

10.2 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

Legal developments have taken the form of amendments to the regulatory framework applicable to PE funds (*fondos de capital privado*) in Colombia. The regulatory framework has been specially amended to respond to international standards with regard to the administration and management of PE funds.

Transaction-wise, the recently adopted tax reform in Colombia impacts the structure of PE transactions and, particularly, the structure of PE transactions with foreign investors and offshore vehicles.

The PE market is expecting that the regulatory authorities expand the scope of permitted investments and participation in investments for institutional investors in PE funds.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)? Do private equity investors engage outside counsel / professionals to conduct all legal / compliance due diligence or is any conducted in-house?

Typically, PE transactions involve exhaustive legal due diligence prior to any equity investment or acquisition. Over the last few years, compliance has been taken a more significant role in legal due diligence, as a consequence of anti-money laundering and counter-terrorism financing rules and anti-corruption regulation. Foreign regulation regarding these matters (e.g. the Foreign Corrupt Practices Act) has taken a predominant concern in PE transactions.

Usually PE investors rely on outside counsel for the purposes of the legal due diligence.

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

As mentioned above, anti-bribery and anti-corruption has become an increasing concern in PE transactions and, therefore, PE investors carry compliance due diligence and incorporate strict provisions in contracts (share purchase agreements and shareholders' agreements).

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

PE investors are, in general, protected by the rules of limitation of liability for shareholders in corporations (*sociedades anónimas*) and simplified corporations (*sociedades por acciones simplificadas*). Such protection and limitation of liability may be questioned in case the portfolio company was used for fraud purposes or with the intention of damaging third parties.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

PE investors must be familiar with the regulatory framework for PE funds (*fondos de capital privado*) incorporated in Colombia.

PE funds in Colombia are under the control of the Superintendence of Finance. Prior to the beginning of operations, the PE fund administrator must submit to the Superintendence of Finance certain information (e.g. draft of the by-laws, profile of the persons that will be designated to the investor committee, among others). If the Superintendence of Finance, after receiving complete documentation, does not object to the incorporation of the PE fund within the following 10 days, the PE fund will be automatically authorised to operate. PE funds have an statutory structure that has: (i) a PE fund administrator (exclusively a Colombian broker-dealer, a trust company or an investment management entity); (ii) a PE fund manager (individual or entity that can be appointed by the PE fund administrator); (iii) an investment committee; (iv) an oversight committee; (v) a general assembly of investors; (vi) a custodian; and (vii) (at least two) investors.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Santiago Gutiérrez
Lloreda Camacho & Co.
Calle 72 No. 5-83
Piso 5
Colombia

Tel: +57 1 326 4270
Email: sgutierrez@lloredacamacho.com
URL: www.lloredacamacho.com

Santiago is Partner at Lloreda Camacho & Co. He joined the firm in 1992 and heads the Corporate and Finance practice areas, and also co-heads the M&A practice group.

He has a law degree from Universidad Javeriana in Bogotá and completed postgraduate studies in Financial Management at the School of Marketing and Management (ESMA) in Barcelona, Spain.

Santiago also won the "Deal Maker of the Year Award – 2015 Edition" in Colombia granted by *Finance Monthly Magazine (UK)* with our partner Andrés Hidalgo. He is a member of the International Bar Association and of Lawyers Associated Worldwide. Santiago is currently President of the Chamber of Legal Services of the National Association of Industries (ANDI). Santiago is co-author of the Colombia chapter of *Getting the Deal Through – Mergers and Acquisitions*, edited by Law Business Research, London, 2015.

Juan Sebastián Peredo
Lloreda Camacho & Co.
Calle 72 No. 5-83
Piso 5
Colombia

Tel: +57 1 326 4270
Email: jperedo@lloredacamacho.com
URL: www.lloredacamacho.com

Juan Sebastián is a senior associate of the Financial and Capital Markets Law Practice at Lloreda Camacho & Co.

Juan Sebastián has extensive experience structuring financial transactions, including project finance, syndicated loans, derivatives, repos, and securitisations. Juan Sebastián has advised national and international banks, multilateral creditors, investment firms and private equity funds in syndicated loan transactions, private equity transactions, transactions for the financing of infrastructure in Colombia and several of the most relevant capital markets transactions.

Juan Sebastián earned his JD from Universidad del Rosario and obtained specialisation degrees from Universitat Pompeu Fabra in Barcelona, Spain (2011), and a specialisation degree in financial and capital markets law from Universidad Externado de Colombia (2015). In addition, Juan Sebastián obtained in 2016 a Master's degree (LL.M.) in Banking Law and Financial Regulation from The London School of Economics and Political Science.

LLOREDA·CAMACHO &CO

Lloreda Camacho & Co., with an experience of more than 75 years, is widely recognised as a Colombian leading law firm that provides integral legal services especially to foreign companies and funds doing business in Colombia.

Our Financial Services and M&A Practices are recognised for their active involvement with the private equity industry in Colombia. Partners and associates of the firm have been involved in some of Colombia's most relevant private equity transactions. Likewise, partners and associates participate, or have participated in the past, as members of the board of directors of listed companies, institutions of the capital markets and entities under the surveillance of the Superintendence of Finance of Colombia.

Our members are well regarded for their in-depth knowledge of Colombian and cross-border regulation that impacts private equity transactions.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com