

Chapter 10

Colombia

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I. OVERVIEW

§ 10:1 Introduction

The purpose of this chapter is to analyze the legal regime for secured transactions in Colombia and to compare it with the report on security interests issued by the Secretary General for the United Nations Commission on International Trade Law Number (UNCITRAL).

Colombian laws on traditional security instruments had remained relatively unchanged for many years, with the sole exception of the insolvency regime, which was thoroughly revised in 2006. However, in August 2013, Law Number 1676 of 2013 was enacted, establishing a new regime applicable to all kinds of securities over movable assets.¹ Thus, all previous regulation applicable to pledge and similar agree-

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¹Article 4 of Law Number 1676 expressly excludes from its scope the following assets: aircraft, aircraft motors, helicopters, rail equipment and other categories

ments was modified by Law Number 1676, effective 21 February 2014. The regulation applicable to securities over immovable assets (mortgage) and guarantee trust agreements (*contratos de fiducia mercantil con fines de garantía*) remained unchanged.

This chapter addresses rules and regulations pertaining to securities over movable assets (*garantías mobiliarias*), mortgage agreements, and guarantee trust agreements. The foregoing are the most commonly available and used security instruments in Colombian markets.

§ 10:2 Key objectives of secured transactions regime

a) In general

A security's purpose is to mitigate the creditor's payment risk that results from a breach of an obligation by the debtor. Secured obligations must be differentiated from correlative securities because the security is a fallback mechanism, arising only upon failure to comply with the secured obligation.

b) Utilize full asset value to access credit

Recommendation 2 of the UNCITRAL Legislative Guide suggests that all types of property should be subject to security laws. In addition, all types of obligations, whether present or future, determined or determinable, should be eligible as collaterals. Lastly, the recommendation advises that both legal and natural persons should be subject to the security's legal regime.

The Colombian securities legal system has strictly conformed to UNCITRAL's recommendation in connection with assets, obligations, and persons. Colombian law is broad as to what can be encumbered; tangible and intangible, as well as movable and immovable assets may be subject to security. There are few exceptions as to the assets that cannot serve as securities, and the reasons for them are mostly based on public policy.

Additionally, Colombian securities regime is comprehensive as to the type of obligations that can be secured, the number of times that an asset can serve as a security, and the nature of the persons involved in a security scheme, (the latter taking into consideration that almost any natural or legal person may act as a party in a security facility).

c) Obtain security in simple and efficient manner

By and large, the creation of an enforceable security interest in Colombia requires registration of some sort, coupled with a written

regulated by Law Number 967 of 2005; securities and financial instruments regulated by Law Number 964 of 2005, and securities over negotiable instruments regulated by the Commercial Code, as well as money deposits, when the depository is the creditor.

security agreement. The process consists of the registration of a public deed before the Public Instrument Registration Office in the case of mortgages and, in the cases of non-possessory *garantías mobiliarias* and guarantee trust agreements, the filing of a private document agreement with and the registration of the security in a special electronic registry.¹

Compared to other countries that have developed electronic systems, in the case of a mortgage agreement, Colombia's registration system lags in that registration is done only in books and in each immovable asset's file. However there is an electronic system created to consult the status of real states properties, through this consultation method it is possible to verify if a property has been secured with a mortgage.

In the case of *garantías mobiliarias* and guarantee trust agreements, pursuant to Law Number 1676, a new and unified registration system has been created and is intended to provide an accurate and updated mechanism to verify all securities registered on a determined guarantor or asset, as the case may be.

The UNCITRAL Guide advocates efficient securities legal systems that reduce the cost of credit. The security registration process in Colombia, in the case of the mortgage, is not efficient. Notarial and registration fees payable in connection with their perfection and registration, rival the same fees and expenses that would have accrued if the parties were to transfer the relevant asset.

In the case of *garantías mobiliarias*, Law Number 1676 purports to allow this type of securities to be easily and cost effectively created and perfected. For example, Law Number 1676 provides that notarial certifications are no longer required, and registration fee accrues are fixed and rationalized (but are yet to be determined).

Colombian securities regulations establish different methods for constituting securities, depending on the asset to be encumbered and the selected security agreement. the UNCITRAL Guide recommends countries to have a single method, regardless of the asset or the security agreement involved.

d) Validate non-possessory security rights

The actual possession of an encumbered asset need not be transferred on creation of a security interest. Normally, the debtor will retain possession of the encumbered asset, insofar as it is required for its activities in ordinary course of business.

According to the UNCITRAL Guide, liens should not interfere in the development of the debtor's business. This is why the Colombian securities law allows the debtor to remain in possession of assets,

[Section 10:2]

¹Law Number 1676 of 2013.

provided that such assets are indispensable for the continuance of its economic activity. However, to properly protect the creditor's right, non-possessory securities must be registered before a public registrar office.

e) Establish clear and predictable priority rules

The UNCITRAL Guide refers to priority rules as necessary to use the full value of the assets, for example, making it possible for an asset to have more than one encumbrance. Moreover, the UNCITRAL Guide determines that the party to be secured must, when entering into a security agreement, be aware of the priority its security right in encumbered assets has in connection to the rights of other creditors.

Colombian law contemplates rules for creditor priority. Additionally, there are rules established for multiple creditors that have an obligation secured by one single asset. By far, Law Number 1676 constitutes a mayor advance towards the objective pursued by UNCITRAL as it will centralize and unify in a single registry all records of *garantías mobiliarias* and guarantee trust agreements. Therefore, priority will be easily determined by the date and time of registration.

f) Facilitate enforcement of creditor's rights in predictable and timely manner

In general, Colombian law provides that the enforcement of a creditor's rights should take place through a legal proceeding which may take between two and five years; therefore, the procedure in Colombia is far from timely and is also unpredictable.

Guarantee trusts are treated differently because the trustee has a contractual authority to sell the encumbered assets when the debtor is in breach of its obligations. Sale proceeds will be applied to the payment of the delinquent obligation. Thus, since the trustee can directly sell the assets without initiating a judicial proceeding, the creation of a guarantee trust results in a more predictable outcome, and is faster in its execution than a pledge or mortgage.

However, if a trustor enters into an insolvency situation, under a fiduciary estate (*patrimonio autónomo*), the encumbered assets will be returned to the debtor's own estate and, thereafter, the treatment afforded to creditors of a mortgage or pledge will be no different than that given to a beneficiary in a guarantee trust. However, under Decree Number 1038 of 2009, the aforementioned will not cover assets that have been transferred to a fiduciary estate, under a guarantee trust agreement, with the purpose of being secured with such assets. As per Decree Number 1039, such assets are legally excluded from the debtor's insolvency estate when the debtor is about to be liquidated, provided the assets served as security for payment of a loan incurred by the debtor and the guarantee trust was duly registered as mentioned above.

Law Number 1676 introduces new enforcement mechanisms for

garantías mobiliarias that are direct payment and a special enforcement proceeding, both explained below. Predictability and time on these new alternatives is yet to be evidenced but regulator purposes were oriented towards such goal.

g) Provide for equal treatment of domestic and non-domestic creditors

Colombian legal provisions offer equal treatment for domestic and non-domestic creditors. Therefore are no special requirements in order for non-domestic creditors to initiate foreclosure proceedings under security agreements in Colombia.

h) Recognize party autonomy

the UNCITRAL Guide establishes that the secured creditor and the debtor should be able to amend or supplement the security agreement. This principle is upheld under Colombian law. Parties may agree, at any time, and from time to time, to amend, restate, replace, or supplement security agreements, as long as there is no contravention of public policy or law.

i) Encourage responsible behavior by enhancing transparency

The creation and use of securities has typically been a well-established practice in Colombian law and, therefore, one may say that the general public is acquainted with the particulars of relevant laws and practices. However, proper communication and application of Law Number 1676 is yet to be seen.

II. BASIC APPROACHES TO SECURED OBLIGATIONS

§ 10:3 In general

Security obligations in Colombia have been historically deemed accessory contracts associated to a principal obligation provided under other contracts. Hence, the enforceability of the security depends on the validity and enforceability of the secured obligation. However, despite the fact that the obligation derived from the security contract is accessory, the contract itself is independent.

Law Number 1676 has established that *garantías mobiliarias* are primary or principal agreements and, therefore, do not require for their existence that of another agreement containing the corresponding secured obligations. However, due to the short period of time during which Law Number 1676 has been in effect, the implications that may arise from this provision have not been tested or evidenced nor are they completely clear.

Under Colombian legislation, the Civil Code (*Código Civil*), the Commercial Code (*Código de Comercio*), and Law Number 1676 regulate security contracts. The Commercial Code applies to activities

that are defined as commercial¹ and activities carried out by business persons.² However, if there are any commercial aspects not regulated by the Commercial Code, provisions of the Civil Code apply in subsidiarily.³ For all activities not considered mercantile, the Civil Code applies. Law Number 1676, as already mentioned before, applies to *garantias mobiliarias* either for civil or commercial transactions.

§ 10:4 Instruments traditionally designed for security

Both in the civil and commercial regimes, there is a general division between personal (*in personam*) and real (*in rem*) securities. Personal guarantees imply that guarantors are held liable for the guaranteed obligation; real securities refer to the creation of liens over assets. In addition, securities are divided into movable and immovable categories.

§ 10:5 Use of title for security

Traditionally, the securities regime does not demand for the transfer of the ownership title as the debtor remains the owner of record of the encumbered asset. However, in most cases, the security must be registered to allow subsequent judicial foreclosure. In other situations, delivery of the asset is required; in this event, the guarantor remains the owner of the asset, even though the secured creditor has its possession. In the case of control agreements over bank accounts, as recently regulated by Law Number 1676, control is granted.

Guarantee trusts do require transfer of property for the perfection of the security, which will only happen once the guarantee trust is constituted and the assets are transferred to the fiduciary estate. The parties agree to the conditions and instructions for the operation of the trust. Once the obligation or obligations secured by the trust are complied with, the title and assets will return to the owner. If there is a breach of the obligations, the assets will be, in most cases, divested and proceeds applied to the payment of the secured obligation.

§ 10:6 Summary and recommendations

The Colombian regime contemplates encumbrances over almost all types of assets. There are three security contracts that can be used to encumber such assets, namely:

1. The *garantía mobiliaria*;

[Section 10:3]

¹Commercial Code, article 20.

²Article 10 of the Commercial Code provides that anyone who professionally carries out any of the activities established in article 20 of the Commercial Code is legally considered as a merchant or business person.

³Commercial Code, articles 2 and 822.

2. The mortgage; and
3. The guarantee trust.

These agreements differ in the way they are executed, the type of assets they encumber, and the need to transfer possession of property.

III. CREATION OF SECURITY OBLIGATIONS

§ 10:7 In general

As mentioned above, security agreements are, depending on the type of security, either main or accessory to other agreements containing the terms and conditions of the secured obligation. In the case of accessory agreements, the validity and enforceability of the security will be a reflection of the secured obligation's own validity and enforceability.¹ A security contract, from a documentary standpoint, is separate and independent from the main contract containing the corresponding secured obligation.

§ 10:8 Basic elements common to all contracts

All commercial and civil contracts, including security agreements, must meet four basic standards for their validity and enforceability.¹ These requirements are:

1. Legal capacity of both parties;²
2. Conscionable and free consent;³
3. Lawful object, in the sense that the agreed considerations are not prohibited by law;⁴ and
4. Lawful cause, meaning that stated motives are not prohibited by the law or in contravention of moral practices or public policy.⁵

Should one of the above elements be absent, the agreement will be regarded as null or non-existent. When a contract lacks will or consent of any of the parties, object, or a required solemnity, the result will be the non-existence of the contract. Additionally, contracts may be real, consensual, or solemn, depending on the way they are perfected. The first are executed with delivery; the second are perfected by mere consensual agreement among the parties; the last are perfected with a written private document, public deed, and/or registration before

[Section 10:7]

¹Civil Code, article 1499.

[Section 10:8]

¹Civil Code, article 1502.

²Civil Code, articles 1503 and 1504.

³Civil Code, article 1508.

⁴Civil Code, article 1519.

⁵Civil Code, article 1524.

the corresponding authority.⁶ Securities agreements are deemed as solemn contracts.

§ 10:9 Basic elements of security agreements

In addition to elements common to all contracts, security agreements have two specific elements that are mandatory, namely:

1. The secured obligation; and
2. The collateral.

The absence of either of the elements may result in the non-existence of the security agreement or the creation of a different type of contract.

§ 10:10 Basic elements of secured obligations

Colombian securities regime does not make a clear classification of the obligations that may be subject to a security agreement, nor does it classify the securities that can be granted depending on the type of obligation intended to be secured.

Colombian legislation is very broad with regard to the obligation being secured; it allows various obligations to be secured, including positive obligations, negative obligations, and payment obligations. One security agreement can secure one or more obligations. In addition, such obligations may exist at the moment of the execution of the agreement, or they may come into existence in a future time. The amount secured can be determined or may be determinable but, at the moment the security is enforced, the amount must be well defined. As to secured obligations related to the encumbered assets, guarantee trust and possessory *garantías mobiliarias* may only secure one or several obligations (present or future) indicated in the corresponding trust or *garantía mobiliaria* agreement. On the contrary, non-possessory *garantías mobiliarias* and mortgage can secure obligations pertaining to multiple agreements.

§ 10:11 Assets to be encumbered

The Civil Code establishes that all tangible and intangible assets may be sold, except for those where the law strictly forbids alienation.¹ If such assets cannot be sold, they cannot be encumbered since eventual disposal would be forbidden. Moreover, assets to be encumbered may exist, or be expected to exist, as long as they are determined at least regarding the type of commodity. The quantity may be undetermined but determinable and, if the asset is a fact, it must be physi-

⁶Civil Code, article 1500.

[Section 10:11]

¹Civil Code, article 1866.

cally and morally possible.² As has been mentioned, there are certain assets that cannot be encumbered. Such assets are:

1. Assets outside the stream of commerce that, to such extent, cannot be subject to any transaction (i.e., assets subject to previous judicial attachments);
2. Certain inalienable rights or privileges that cannot be transferred to another person (i.e., parenthood rights); and
3. Assets that have been confiscated with judicial order unless the judge grants the authorization or the creditor consents to the sale.³

§ 10:12 *Garantías Mobiliaria*

In the case of a *garantía mobiliaria* agreement, any intangible or tangible movable asset may be subject to the security. Several types of assets used in the course of industrial and commercial activities, over vehicles or intangible assets (such as intellectual property rights) as well as interest rights in companies, require for the *garantía mobiliaria* to be registered, not only before the registry created by Law Number 1676, but also before the corresponding special registry depending on the type of asset; otherwise, there would be no evidence for third parties to acknowledge the existence of the securities nor will it be possible to initiate judicial proceedings.

Mortgages, on the other hand, may be perfected over immovable assets, ships and aircrafts that for securities purposes are treated as immovable assets. However, applicable law establishes a few exceptions where movable assets may be subject to a mortgage.¹ There are no specific limitations for guarantee trusts (*fiducia en garantia*) as to the type of asset that might be encumbered. Thus, tangible or intangible, as well as movable or immovable assets can be secured by this kind of fiduciary scheme. Nevertheless and as has already mentioned before, registration in the registry created under Law Number 1676 must occur.

§ 10:13 *Garantías Mobiliaria—Definition*

A *garantía mobiliaria* is a security that falls on tangible movable or intangible assets. Generally, a *garantía mobiliaria* asset secures the payment of the obligation, but it may be instated for the creation of a security for the performance of non-monetary obligations. The secured obligation needs not to be in existence at the time of the creation of

²Civil Code, article 1518.

³Civil Code, article 1521.

[Section 10:12]

¹Commercial Code, articles 1570 and 1904.

the security, provided that the amount and period of the obligation are initially established.¹

§ 10:14 *Garantías Mobiliaria*—Minimum content

As a security agreement, a *garantía mobiliaria* must comply with the basic elements common to all contracts and those that are specific for securities. However, the collateral must be movable property or intangible assets that can be individually identified. The property can belong to a third party, but the creditor must be made aware of this.

In addition, according to Law Number 1676 of 2013 the *garantía mobiliaria* shall be created throughout written agreements which include, at least the names, identification numbers and signatures of the parties; the maximum amounts covered by the guaranty; a description of the good or goods over which the security is granted; and a description of the guaranteed obligations, present or future, or the applicable rules for identifying an undetermined obligation.

As to intangible assets, it is possible to encumber under a *garantía mobiliaria* any right. The collateral might also be a commercial establishment. A commercial establishment is a legal fiction to integrate as a sole asset a group of assets organized by a businessperson to carry out the commercial objectives of a company.¹ According to commercial laws, the commercial establishment is considered to be a universality and, therefore, subject to a pledge, much in a fashion of the Anglo-Saxon floating pledge.

Prior to the enactment of Law Number 1676, fungible assets could not be granted as collateral. Nowadays, it is possible to execute control agreement over bank accounts, whereby the funds therein deposited are encumbered and serve as collateral for payment under *garantía mobiliaria* agreement.

§ 10:15 *Garantías Mobiliaria*—Formalities and publicity

A *garantía mobiliaria* may be granted by means of executing an agreement which contains at least the minimum required elements mentioned above. However, the agreement will have effects *vis-à-vis* third parties from the moment when either one possession or tenancy of the encumbered asset is transferred, control is granted, or the agreement is duly registered.

In the case of *garantias mobiliarias* whereby tenancy is granted, it is clear that the corresponding secured creditor holding the asset at

[Section 10:13]

¹Law Number 1676 of 2013, article 3.

[Section 10:14]

¹Commercial Code, article 515.

the time will be the only being secured by it (provided no other secured creditor holds has already been secured by it and possession was not transferred at the time).

In the case of *garantía mobiliarias* constituted as control agreements over bank accounts, neither registration nor possession will determine their priority. In this case, the enforceability of the security will be determined based on the moment the corresponding secured creditor gains control over the corresponding bank account.

Finally, in the case of *garantías mobiliarias* where neither tenancy nor control is granted, registration on the registry created by Law Number 1676 is mandatory and priority for payment will be determined based solely on the date and time it occurs.¹ In this sense, the filing and registration of the *garantía mobiliaria* is mandatory and absolutely advisable since its registry also constitutes the executive title (*título ejecutivo*) pursuant to which the obligation therein contained will be enforceable. Under this understanding, any *garantía mobiliaria* that is not duly registered before the registry cannot be duly enforced. On the same vein, all acts whereby the *garantía mobiliaria* is modified, extended, cancelled, transferred or judicially executed must be registered for its enforceability.

Law Number 1676 created a specific type of security over movable assets known as *garantía mobiliaria prioritaria de adquisición*. This security is meant to have a special priority since it is intended to be given to those creditors that finance the acquisition of movable assets over which the guarantee is granted (e.g., inventory). If this type of security over a movable asset is duly executed and registered as such before the registry created by Law Number 1676, the guaranteed party will have a super-priority over any other securities that rely over the same movable assets, even if this other securities have been entered into on a date prior to the one of the relevant *garantía mobiliaria prioritaria de adquisición*.

§ 10:16 *Garantías Mobiliaria*—Rights and Obligations of parties

Under a *garantías mobiliarias*, as per article 18 of Law Number 1676, the guarantor will have the right to use, transform, sale, swap, rent and establish another security over movable assets in connection with ordinary course of business. In addition, the guarantor can transfer or sell loans or receivables arising from the sale, exchange or lease of the collateral. Its assignee or purchaser may make such charges regarding to those loans or accounts provided and when movable assets were attributable to the ordinary course of business. Unless otherwise agreed, the guarantor may:

[Section 10:15]

¹Law Number 1676 of 2013, article 48.

1. Suspend the right to charge when the authorized entity (notaries and chambers of commerce) or the creditor notifies to the guarantor of its intention to enforce the security over movable asset. The right to use will not be suspended, but the guarantor will be responsible for damages arising from the use of the movable asset and caused to the creditor.
2. Avoid losses and deterioration of the movable asset and make all efforts to achieve this purpose.
3. Allow the creditor to inspect the movable assets to verify the quantity, quality and its conservation.
4. Assume all risks of destruction, loss or damage of the movable asset, except in cases of an insurance agreement in favor of the creditor; and
5. Pay all expenses and taxes related to the movable asset.

Under article 19, the secured creditor must:

1. Take the necessary care on the custody and preservation of the movable asset. Unless otherwise agreed, the reasonable care involves taking all necessary measures to preserve the value of the movable asset and the rights derived from it;
2. Maintain the movable assets identifiable and, for the case fungibles assets, maintain the same quality and quantity;
3. Make use of the movable assets under the limits contemplated in the security agreement; and
4. Charge the guarantor the maintenance expenses when the creditor has the tenancy and has been previously agreed.

When all the obligations of the guarantor in favor of the creditor are completely satisfied, the secured creditor has the right to:

1. Request from the creditor the return the movable assets under the limits contemplated in the security agreement;
2. Cancel the control over the bank accounts;
3. Notify the debtor of an assign loan as to the compliance of the obligation and relieve him from all duties; and
4. Present the registration form of cancellation of the security of movable assets.

Unless otherwise agreed, when some of the guarantor's obligations in favor of the creditor are partially satisfied, the creditor has to present a registration form regarding the modification over the elimination of certain movable assets or the reduction of the maximum amount of the secured obligation.

§ 10:17 *Garantías Mobiliaria—Effects*

In general. Law Number 1676 provides for new and additional enforcement alternatives regarding securities over movable assets. Prior to Law Number 1676, pledge agreements could only be enforced

in Colombia by means of judicial proceedings, whereby a judge would seize the corresponding encumbered asset and sell it through a public auction process. This meant that the secured creditor could only be paid with the proceeds of such public sale, and had no legal possibility, upon enforcement, of taking possession of the secured asset.

Law Number 1676 provides for not only the possibility for the parties to contractually agree the direct payment in case of default (direct payment), but also for the alternative of a special enforcement procedure (special enforcement procedure), as described below.

Direct payment. Law Number 1676 establishes that the guaranteed party, under a *garantía mobiliaria*, may enforce its security by requesting the debtor directly, not before a judge, for the transferal of the property over the movable assets object of the *garantía mobiliaria*. However, in order to achieve this in the case of a non-possessory *garantía mobiliaria*, it is mandatory to expressly include the alternative of Direct Payment in the *garantía mobiliaria* agreement. If it is not expressly provided for, it is not possible to enforce a *garantía mobiliaria* through Direct Payment.¹

Special enforcement procedure. Law Number 1676 also sets forth the possibility for the parties to agree on a special enforcement procedure, by means of which the *garantía mobiliaria* may be enforced before a notary public or a chamber of commerce. These institutions are then responsible for enforcing the security, deciding whether the proceeding is valid and, if so, under which conditions.

Under the procedure, the debtor is allowed to present arguments opposing the *garantía mobiliaria*'s enforcement, and the notary public or chamber of commerce must decide whether or not to sale or adjudicate the movable assets object of the *garantía mobiliaria* to the creditor. In addition, the property can be sold in a judicial proceeding and the resulting proceeds will be applied to payment of the secured obligation.²

§ 10:18 Mortgage over immovable and movable assets

a) Definition

A mortgage agreement as a security is comprehensively regulated by the civil regime. Normally, mortgages fall on immovable properties; however, there are two exceptions where a mortgage may be created over movable property. These exceptions are regulated under

[Section 10:17]

¹Under article 62 of Law Number 1676 direct payment also will proceed when the secured creditor is in possession of the encumbered asset, the secured credit has a legal right to retain the encumbered asset (*derecho de retención*); the encumbered asset has a value of less than 20 minimum monthly legal wages in Colombia, and the encumbered asset is a perishable good.

²Law Number 1676, article 61.

commercial law, and refer to mortgages for the creation of liens over aircrafts and ships.¹

Unlike certain kinds of *garantías mobiliarias*, under a mortgage, the owner of the secured property does not surrender possession thereof.² Consequently, the security must be registered to be opposable to third parties. Mortgages are solemn agreements, requiring a notarial deed and subsequent registration with the Land Registration Office. In addition, the effect of mortgage liens may be subjected to a condition or term,³ on verification of which the lien will arise to secure non-existent, albeit future, obligations.

b) Formalities and publicity

As mentioned above, perfection of mortgages entails compliance with certain formalities. A mortgage agreement must be documented through a notarial deed and registered with the Land Registration Office.

c) Rights and obligations of parties

A mortgaged creditor has the right to request, before a Colombian judge, the sale of the asset to obtain the payment of the secured obligation.⁴ The secured creditor also has the right to seek restitution of the secured asset against any unlawful holder and demand immediate payment of the secured obligation if the mortgaged asset has substantially deteriorated in a way that no longer offers adequate security for the obligation.⁵

If the debtor enters an insolvency proceeding, the creditor will have the right to receive payment of the secured obligation according to the legally prescribed rules of priority. Mortgages are in the third tier of priority, superseded by health and burial expenses, labor and tax payments, and secured creditors by *garantías mobiliarias*. A mortgaged debtor has the right to exercise property rights against third parties and the right to sell the mortgaged asset and to create more than one mortgage over the same asset.⁶

d) Effects

A mortgage will be extinguished when the secured obligation is paid. It also will be extinguished on the resolution of the mortgagee's right, following the resolution of the underlying contract, on expira-

[Section 10:18]

¹Commercial Code, article 1570.

²Commercial Code, article 2432.

³Civil Code, article 2438.

⁴Civil Code, article 2448.

⁵Civil Code, article 2451.

⁶Civil Code, article 2440.

tion of the right, or if the prescribed term for which it was created for is met.⁷

§ 10:19 Guarantee trust

a) Definition

A guarantee trust, prior to Law Number 1676, emerged as a substitute or complement for the more traditional pledge agreement (as regulated prior to Law Number 1676) and mortgage, resulting from the fact that disposition of collateral does not require a judicial sale, other than in the event of an insolvency proceeding where the assets of the fiduciary estate are reinstated to the debtor's estate, as explained above. There are three parties involved, namely:

1. The trustor or grantor;
2. The trustee or trust company by virtue of which the trustor transfers the trust property to a fiduciary estate; and
3. The beneficiary who will receive the property (or its proceeds) on occurrence of stated events of disposition.¹

Unlike the mortgage, the guarantee trust is a principal contract and not an ancillary arrangement; hence, its period of existence does not depend on the duration of the obligation that is being secured.

b) Minimum content

In addition to the legal requirements for all contracts and for security agreements, the guarantee trust agreement is the contractual means by which a notional estate is created, which is separate and autonomous from the asset pool owned by intervening parties. The owner of record of the trust property is the fiduciary estate (and, therefore, other creditors of the debtor are not in a position to seek payment relief over relevant assets).²

Colombian law permits the transfer into a trust of one or more movable or immovable assets or rights as long as they are individually identified. In addition, in the case of the guarantee trust, practice has shown that the trustor remains in possession when the secured assets are immovables, machinery, or equipment used in connection with ordinary course of business.

In all other cases, it is usually agreed that possession is transferred to the trustor by virtue of the agreement. The assets subject to the guarantee trust may not be pursued by any creditor different from the beneficiary, as the assets in the trust are no longer part of debtors' estate, subject to certain limitations and protections of third parties'

⁷Civil Code, article 2457.

[Section 10:19]

¹Commercial Code, article 1226.

²Commercial Code, article 1238.

interest. The trust may only secure the obligations specifically stipulated in the trust agreement.³

However, if the trustor enters into an insolvency situation, the encumbered assets will be reinstated to the insolvency estate, and any debt may be paid with the assets that have been reinstated. The aforementioned, with the exception of assets transferred into a fiduciary estate, under a guarantee trust agreement with the purposes of obtaining financing for the debtor, secured with such assets which, as provided by Decree Number 1038 of 2009, are excluded from the insolvency estate in the case of liquidation.

c) Formalities and publicity

Even though the guarantee trust has usually three parties involved (trustor, trustee, and beneficiary), the trust is a bilateral agreement. This is due to the fact that only the trustor and trustee need to agree on the essential elements to execute the contract.

It also has a consensual nature, although article 3 of Law Number 1676 establishes that the guarantee trust agreement requires registration before the registry created by Law Number 1676. It is a publicity procedure required for the agreement to have effect *vis-à-vis* third parties.

However, when the asset that is being transferred to the fiduciary estate is immovable or needs to comply with a registration requirement, this act can be included in the trust agreement but, in such a case, it would be a solemn agreement subject to public deed and registration with the corresponding authority.

When the trust is constituted only with movable property, there is no need for registration of the assets, only of the agreement in order for it to be opposable and evidenced.⁴ The assets transferred to the fiduciary estate must be specifically individualized in the agreement.

d) Rights and obligations of parties

The trustor will be able to exercise the rights provided for in the trust agreement over the secured assets. In addition, the trustor will have the right to:

1. Revoke the trust if such possibility was established in the trust agreement;
2. Ask for the removal of the trustee;
3. Receive the assets back, once the trust agreement is terminated;
4. Demand rendering accounts;
5. Take legal action against the trustee; and

³Commercial Code, article 1227.

⁴Law Number 1676 of 2013, article 3.

6. Exercise all rights expressly provided for in the trust agreement, as long as they do not contravene the essence of the agreement.⁵

In addition to the obligations imposed in the trust agreement, the trustee must:

1. Diligently carry out all necessary acts to comply with the finality of the trust;
2. Maintain the trustee's fiduciary estate apart from all other estate and its own assets;
3. Invest the assets of the trust in the way it was established in the trust agreement unless the trustee has been given freedom to take decisions as to where to invest;
4. Legally represent the trust to protect and defend the assets before third parties and even before the trustor;
5. Consult the Colombian Financial Superintendence (*Superintendencia Financiera de Colombia*), when in doubt, as to the extent and nature or the effects of the obligations established in the agreement;
6. Make best efforts to maximize returns on investments made with trust property;
7. Transfer the assets to the corresponding person once the trust agreement expires; and
8. Render accounts for its acts to the beneficiary at least every six months.⁶

In addition to the rights stipulated in favor of the beneficiary under the agreement, the beneficiary is entitled to:

1. Demand that the trustee complies with all its contractual obligations;
2. Object to actions taken by the trustee;
3. Object to preventive injunctive measures affecting the secured assets; and
4. Request that the Financial Superintendent removes the trustee when there is just cause.⁷

e) Effects

Unless otherwise provided for in the trust agreement, upon its expiration, secured assets must be returned to the trustor. On crystallization of the guarantee, the trustee must proceed as prescribed in the agreement, which normally entails the disposition of the secured asset.

§ 10:20 Prohibited trust agreements

Trusts cannot be held secretly; nor can they appoint successively

⁵These rights and their exercise may be regulated in the trust agreement.

⁶Commercial Code, article 1234.

⁷Commercial Code, article 1235.

different persons as beneficiaries. Until Law Number 1328 of 2009 (15 July 2009), trusts could not exceed 20 years; this prohibition has been lifted.¹ The regulation does not establish a new term; thus, it is understood that the temporary limitation for this type of contracts has ceased.

Trust agreements cannot be created for purposes that the trustor cannot execute directly. This modification satisfies the need for a greater term of trusts, allowing a better development of certain fiduciary business. The aforementioned becomes an important instrument for the structuring and financing of projects that require a greater time limit than the one previously allowed.

§ 10:21 Guarantee trust

The guarantee trust evolved as a safer and more efficient security system in comparison to the more traditional pledge (prior to Law Number 1676) and mortgage. Reasons for this include:

1. The collateral only serves as security for the specific purpose stated in the agreement;
2. The liquidation of collateral is effected in a more expeditious manner; and
3. The collateral is usually disposed of at commercial value.¹

Nevertheless, it is debatable and yet to be evidenced if, under Law Number 1676, possible securities such as a control agreement will not only be as safer and efficient as guarantee trust agreement, but more economic, because no trustee will have to be involved.

IV. FILING

§ 10:22 In general

A filing procedure provides transparency and publicity to a secured transactions regime. As suggested by the UNCITRAL Guide, the purpose of this requirement is to:

1. Provide a catch-all mechanism that will allow both existing and future assets to be captured by the security in a way that it is enforceable against third parties;
2. Mark an objective temporal point of reference for the determination of relevant payment priorities; and
3. Provide a reliable source of public information to be used and taken into account by third parties involved with dealings with the debtor.

[Section 10:20]

¹Commercial Code, article 1230.

[Section 10:21]

¹Notwithstanding the foregoing, the guarantee trust may not be recommended when the collateral consists of movable assets not subject to registration.

a) Garantías mobiliarias

In general

As mentioned above, §§ 10:12 to 10:17, in the case of *garantías mobiliarias* where neither tenancy nor control is granted, registration on the registry created by Law Number 1676 is mandatory and priority for payment will be determined based solely on the date and time it occurs.¹

Therefore, the filing and registration of the *garantía mobiliaria* of this sort is mandatory and absolutely advisable since its registry also constitutes the executive title (*título ejecutivo*) pursuant to which the obligation therein contained will be enforceable.

Under this understanding, any *garantía mobiliaria* that is not duly registered by the creditor before the registry cannot be duly enforced. On the same vein, all acts whereby the *garantía mobiliaria* is modified, extended, cancelled, transferred or judicially executed must be registered for its enforceability.

In addition, several types of assets used in the course of industrial and commercial activities, over vehicles or intangible assets (such as intellectual property rights) as well as interest rights in companies, require that the *garantía mobiliaria* to be registered, not only before the registry created by Law Number 1676, but also before the corresponding special registry depending on the type of asset; otherwise, there would be no evidence for third parties to acknowledge the existence of the securities nor would it be possible to initiate a judicial proceeding. The following are a few examples of special registration of assets.

b) Shares

Article 410 of the Commercial Code establishes that a security over nominative shares is perfected by means of the registration in the stock registry book of the company.

c) Vehicles

Article 1210 of the Commercial Code establishes that a security over vehicles must be registered with the transit office where the vehicle has been recorded in accordance with the procedures established by Law Number 769 of 2002 and Decision Number 51 of 1993 issued by the Ministry of Transport.

§ 10:23 Immovable assets; filing of mortgage agreements

According to article 2432 of the Civil Code, a mortgage agreement encumbers immovable property without transferring it to the secured

[Section 10:22]

¹Law Number 1676 of 2013, article 48.

party. All immovable property can be encumbered, provided that the agreement is perfected through a public deed and registration with the Land Registration Office.¹ The person entitled to register the security is the one entitled to alienate the property.²

For the filing procedure, one original and one copy of the public deed where the mortgage is granted must be delivered, along with a written request of registration and evidence of payment of all the respective fees and taxes. The filing procedure must be completed within the 90 days following execution of the mortgage deed.

§ 10:24 Aircraft and ships

a) Aircraft

Article 1904 of the Commercial Code states that security interests over aircraft must be documented through a mortgage deed. Any kind of aircraft, even those under construction, can be subject to a mortgage, provided that such mortgage is perfected through a notarial deed in which all the necessary specifications required for its further registry are included.¹

The mortgage registration must be entered into effect by the owner of the aircraft or the mortgaged creditor with the Registry Office of the National Aeronautic Authority (*Oficina de Registro de la Aeronautica Civil*). For the filing procedure, one original and one copy of the public deed where the mortgage is granted must be delivered, along with a written request of registration and evidence of payment of all the respective fees and taxes.

b) Ships

As mentioned above, immovable property, as well as major ships and minor ships dedicated to fishing, scientific research, and amusement activities, can be mortgaged by public deed, which must be filed before the local port authority where the ship is registered. The mortgage agreement filing must take place within the 30 days following the public deed execution, if granted in Colombia, or 90 days if granted abroad.²

§ 10:25 Guarantee trust

According to Law Number 1676, guarantee trust agreements must

[Section 10:23]

¹Civil Code, article 2435.

²Civil Code, article 2439.

[Section 10:24]

¹Commercial Code, article 1904.

²Commercial Code, article 1572.

be filed with the corresponding registry created under said Law Number 1676. In addition, given that, in most cases, a guarantee trust agreement execution requires transfer of titles over collateral assets their nature must be taken into account, with respect of mandatory additional filing procedures. If the transferred assets are immovable property or movable goods whose ownership requires registration to effect transfer, such registration must be completed in addition to the registration of the trust agreement as noted above.

V. PRIORITY

§ 10:26 In general

The term “priority”, according to the UNCITRAL Guide, refers to “the extent to which a secured or other creditor may derive the economic benefit of its right in an encumbered asset in preference to a competing claimant”. In Colombia, this concept is regulated in a manner similar to UNCITRAL’s concept.

When several creditors have been guaranteed in the same manner and are part of the same legal priority class, they may be subject to a special priority ranking within their own class.

Garantías mobiliarias

As mentioned above, a *garantía mobiliaria* will have effects *vis-à-vis* third parties from the moment either one of the following occurs: possession or tenancy of the encumbered asset is transferred, control is granted or the agreement is duly registered.

§ 10:27 Mortgage

Mortgages over immovable property, aircraft, and certain ships do not require the asset’s possession by the creditor. It is possible to consider the co-existence of more than one mortgage over a determined asset. It is possible to have a single asset mortgaged more than once, and the order of priority will be determined by the date and order of registration of the lien.

§ 10:28 Guarantee trust

Although there is no special mention regarding creditors secured by a right stemming from a guarantee trust, articles 43 and 50 of Law Number 1116 of 2006 establish that, within any company reorganization or judicial liquidation process, a creditor secured by a guarantee trust will be deemed as a second-class or third-class creditor, depending on the nature of the assets that are part of the trust. Thus, such a creditor will be given the same priority as a creditor of a *garantía mobiliaria* if the encumbered assets are the type of assets that can be secured. They will be deemed as mortgage creditors if the encumbered assets are the type of assets that can be mortgaged.

§ 10:29 Priority over other creditors*a) In general*

Generally, in Colombia, secured creditors have priority on payment over other unsecured creditors. However, there are some special priority rules, with respect to competing creditors of a same debtor, whether they are or not secured.

b) Special priority rules

With respect to creditors of the same debtor whose ship is subject to a mortgage, a special priority rule is established in article 1556 of the Commercial Code. A secured creditor (with mortgage) will be entitled to a payment priority over all other creditors, except those owed certain payments as expressly listed.¹ Article 1905 of the Commercial Code establishes that mortgages on aircraft grant the secured creditor a priority in payment over every other creditor, except for those expressly listed.²

§ 10:30 Pre-default rights and obligations of parties

Compared with the scope accorded to pre-default rights and obligations by the UNICITRAL Guide, Colombia does not include specific dispositions regarding pre-default rights and obligations of parties involved in a secured transaction. However, a general regime of rights and obligations of the parties involved in each type of secured transaction is provided.

VI. DEFAULT AND ENFORCEMENT**§ 10:31 Foreclosure; enforcement procedures**

Once the secured obligation has been defaulted, the relevant secured creditor will be entitled to foreclose on the collateral as per rules stated by law and the relevant agreement.

Garantias mobiliarias

In the case of a *garantías mobiliarias*, enforcement may occur following the proceeding agreed amongst the parties. As mentioned under § 10:22, the alternatives under Law Number 1676 include Direct Payment, Special Enforcement Procedure or judicial procedure as indicated for mortgaged assets below.

§ 10:32 Mortgage foreclosure proceedings

According to Colombian law, it is not possible for creditors secured

[Section 10:29]

¹Commercial Code, article 1556.

²Commercial Code, article 1905.

by a mortgage to be appropriated with collateral assets following default. The Civil Code requires that a judicial proceeding be initiated, during which a judge might order sale of the asset.

It is not possible for the parties involved in the collateral to agree on different foreclosure processes from those established by law.¹ Nor can the guarantor authorize the creditor to freely sell the collateral or to seize possession. Under certain conditions, however, a secured creditor has the possibility to claim, during a judicial proceeding, adjudication of the asset.

In addition to complying requirements for all lawsuits, it is necessary to determine the assets subject to the claim, as well as the relevant security. The existence of the relevant agreement must be evidenced by a copy of the registration. The claim must be presented against the owner of the mortgaged asset. A civil judge of the domicile of the defendant or the place of performance of the obligations will be competent for the case.

If the claim complies with all legal requirements, the judge will issue a payment order (*mandamiento ejecutivo*) against the debtor. In such order, the judge will order the seizure and attachment of the mortgaged assets. The order is subject to appeal.

The defendant becomes party to the litigation once he has been properly served with notice of the payment order. The defendant has 10 business days to answer the claim. If the defendant has exercised his right to present a defense, the judge must order the presentation of evidence. The judge will have 30 business days to review evidence presented to the court.

After the evidence has been collected and evaluated by the judge or the term for evaluation has ended, the plaintiff and defendant have five business days to present closing arguments. After closing arguments, the judge has 40 business days to issue a decision. If the decision is in favor of the plaintiff, the judge will order liquidation of the credit, appraisal of assets, and sale of collateral. In addition, the defendant will be ordered to pay the expenses incurred during the proceeding.

Once the decision becomes an enforceable judgment and the attachment of the collateral has taken place, the plaintiff or the defendant will be able to present the appraisal of the asset and the liquidation of the credit.² During the next three business days after appraisal and liquidation, the defendant will have the opportunity to object. The judge will indicate the date and hour in which the public sale will take place. This information must be published, at least 10 business

[Section 10:32]

¹Civil Procedure Code, article 6.

²Law Number 1395 of 2010.

days before the date of the sale, in newspapers and on the local radio station. If there are no bids, the creditor can ask to have the assets adjudicated in its name or for a second date for the auction.

§ 10:33 Guarantee trust enforcement

A guarantee trust's enforcement occurs when the secured obligation has been clearly and verifiably defaulted. On such event, the trustee must comply with the trust agreement provisions. Generally, they will consist of the involved asset's sale with the purpose of paying the defaulted obligations with its proceeds.

This type of proceeding may only take place when the debtor is not in an insolvency proceeding. Usually, the trust's beneficiaries expect a payment in cash; however, it is possible to agree to be paid with the assets transferred to the fiduciary estate. This provision could apply when the asset's sale is not as profitable as expected and, if performed, it would not be enough to fulfill the secured rights.

VII. INSOLVENCY

§ 10:34 In general

According to the UNCITRAL Guide, an insolvency law is one that "is principally concerned with collective business and economic issues . . ." and ". . . seeks to maximize the return to all creditors, firstly by preventing a race among creditors to enforce individually their right against a common debtor, and secondly by facilitating the reorganization of viable."

In Colombia, Law Number 1116 of December 2006 regulates both reorganization and insolvency proceedings. However, certain proceedings are continuing to conclusion under prior legislation.

§ 10:35 Secured rights in insolvency proceedings

a) In general

Articles 2 and 3 of Law Number 1116 list all persons to which they apply and those who are excluded. A preliminary analysis must be made by a secured creditor to identify whether the debtor is included in this list of those to whom the Law applies.

b) Inclusion of assets in insolvency estate

One of the principles governing insolvency proceedings in Colombia is universality. According to this concept, as mentioned in article 4 of Law Number 1116, all debtor's assets and creditors are subject to the proceeding. Any asset securing any part of the debtor's obligation will be deemed part of the insolvency estate, whether it be encumbered by a *garantía mobiliaria*, mortgaged, granted in trust as guarantee, or otherwise.

However, article 55 of Law Number 1116 also provides a list of excluded assets which will not be a part of an insolvency estate for certain reasons, such as assets being actually held by the debtor as a depositary or agent.

§ 10:36 Limitations on security enforcement

A secured creditor, holding a secured right over a specific asset, must consider this issue as a restriction on its granted security. Even though the creditor will be treated with priority, the fact of having to be a party to the proceeding and having the security (asset) become a part of the insolvency estate constitutes a stay on enforcement rights.

The main consequence of having to become a party to the proceeding and having the guarantee (asset) being a part of the estate is that every creditor must accept and comply with the insolvency regulations, including the freezing of enforcement rights. In the case of a guarantee trust, Law Number 1116 provides a limitation on the enforcement of this type of security, as it expressly determines that, once reorganization proceeding begins, all guarantee trust agreements to which the debtor is party may be terminated if the judge of the proceeding orders it.¹

In any case, those agreements must be terminated when the reorganization agreement is not presented or confirmed,² and when there is a judicial declaration of the liquidation proceeding, guarantee trust agreements executed by the debtor are terminated *ipso jure*.³ The aforementioned, as already exposed above, with the exception of assets transferred into a fiduciary estate, under a guarantee trust agreement with the purposes of obtaining financing for the debtor, secured with the purpose of obtaining financing for the debtor, secured with such assets which, as provided by Decree Number 1038 of 2009, are excluded from the insolvency estate. The effects of the judicial declaration of the liquidation proceeding will not apply also in the case of securitization proceedings through the public securities market.

§ 10:37 Relative priority

In general. In accordance with the UNCITRAL Guide recommendations regarding priority, in Colombia, there is a legal priority order which is deemed a public policy provision,¹ which means that it cannot be modified by private stipulations. The legal priority order established by articles 2495 *et seq.* of the Civil Code is as follows:

[Section 10:36]

¹Law Number 1116, article 21.

²Law Number 1116, article 38(4).

³Law Number 1116, article 50.

[Section 10:37]

¹Civil Code, article 16.

1. First class—Judicial expenses, medical expenses related to the sickness resulting in the decease of the debtor, wages and all other expenses arising from labor relations, necessary subsistence expenses of the debtor and his family over the past three months; child support obligations, and fiscal (tax) credits;
2. Second class—Innkeeper over personnel effects of the debtor; carrier over the effects that it has in its possession; creditors secured with *garantías mobiliarias*;
3. Third class—Credits secured by mortgages;
4. Fourth class—Fiscal credits against collectors and managers of fiscal assets; sons and daughters against parents for their assets administered by them; persons subject to tutorship against their tutors; and raw material suppliers, necessary for production or transformation of goods or for the rendering of services; and
- Fifth class—Unsecured credits and without any preference or privilege.

A secured creditor who has been granted a *garantía mobiliaria* or a mortgage, or has been secured by a guarantee trust, will be deemed as a second-class or third-class creditor, depending on the type of guarantee. Law Number 1676 includes specific provisions related to a *garantías mobiliarias* enforcement in the context of reorganization or liquidation proceedings.

Reorganization proceedings. In accordance with Law Number 1676, a *garantías mobiliaria*, granted prior to the initiation of the reorganization proceedings and relying on movable assets necessary for the proper performance of the guarantor's economic activity, must be enforced as part of the reorganization proceeding. Once this proceeding has concluded and a reorganization agreement has been executed by the creditors and the debtor, the creditors who have in their favor a *garantía mobiliaria* will have the right to be paid prior to any other creditor participating in the reorganization agreement (except for pension payment rights).

As for those *garantías mobiliarias* granted prior to the initiation of the reorganization proceedings over movable assets not necessary for the proper performance of the economic activity of the guarantor, the corresponding secured creditor will be able to directly enforce its security without being included as part of the reorganization proceeding.

Liquidation Proceedings. Pursuant to Law Number 1676, movable assets subject to a *garantía mobiliaria* may be excluded from the universe of liquidation estate assets; they may also be directly assigned to its secured creditor as payment for its debt, with preference over payments to other creditors participating in the liquidation proceeding (except for pension payment rights).

Validly of secured rights and avoidance actions

In any insolvency proceeding under Colombian law, though a

secured creditor is partially dispossessed of most of its security rights, these are recognized and provide a relative priority treatment. On the other hand, there are some acts that, having been previously executed at the beginning of the insolvency proceeding, are not recognized and, therefore, may be revoked. This is the case of acts that are deemed to have been executed by the debtor with the purpose of preventing them from being part of the insolvency estate and creating an obstacle to the insolvency proceeding creditors. In this manner, article 74 of Law Number 1116 provides the conditions an act must comply with to be revoked.