



ICLG

The International Comparative Legal Guide to:

Project Finance 2018

7th Edition

A practical cross-border insight into project finance

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Published by

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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 2018

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ISBN 978-1-912509-07-2

ISSN 2048-688X

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Mexico

Jorge Cervantes



Gonzalez Calvillo, S.C.

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Project finance has been well established in Mexico for the past decade. Although, with the recent Energy Reform, the sectors involving electricity and oil and gas have been increasingly active. The electric power industry is focusing on increasing the production of electrical power to supply Mexican demand, along with harnessing clean energies in order to match the standards of the industry internationally.

1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Trends during the past several years have remained consistent, but the construction and operation of energy related infrastructure projects has seen more activity recently. One of the most significant projects was the construction and operation of the Norte III 950 MW CC 38 Power Plant in Juárez, Chihuahua.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Pursuant to Mexican law, there are several security granting agreements that may be executed for perfecting security interest on real estate and/or moveable assets (property and goods), such as Guarantee Trust (“Security Trust”), Non-Possessory Pledge Agreement (which creates a floating lien over assets) (“NPPA”), Pledge Agreement (“Pledge Agreement”), mortgage (“Mortgage”) and industrial mortgage (available for financial institutions only).

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Subject to obtaining authorisations by third parties and/or government entities, as applicable, security may be granted over real property (including site, pipeline and moveable assets permanently attached to it, among others) by means of either: (i) a Mortgage, which is regulated by local law; and/or (ii) a Security Trust in which

property over the real estate (including site, pipeline and moveable assets permanently attached to it, among others) is transferred to the corpus (trust estate) of the Security Trust.

Both the Mortgage and Security Trust can be formalised by a notary public through public deed and are subject to registration in the Public Registry of the Property of the corresponding state of Mexico in which same is located. Besides the formalities previously mentioned, in case of the Security Trust, a financial institution will be required to act as trustee and shall execute the corresponding Security Trust agreement.

Security over machinery and other equipment may be granted, typically, by means of a NPPA, in which the pledgor holds the possession of the assets, which allows the pledgor to continue utilising such assets in the regular course of business. Additionally, a Pledge may be granted through a Pledge Agreement, but it is not customary, since the pledgor will lose possession of the pledged assets.

To create a first-ranking priority lien, both the Pledge and NPPA shall be formalised before the notary public and registered on the Sole Registry of Movable Securities (*Registro Único de Garantías Mobiliarias*) (“RUG”).

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A security interest may be created to collect receivables by means of either a (i) NPPA, or (ii) a Security Trust.

In case of the NPPA, the debtors will not need to be notified of the security (generally speaking, unless otherwise provided in the specific agreement). Whereas, for the Security Trust, debtors will need to be notified, since collection rights will need to be transferred to the corpus of the Security Trust.

For the procedure to formalise, please refer to question 2.2 above.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A security interest may be created over bank accounts and monies deposited therein, by means of either a (i) NPPA, or (ii) a Security Trust.

For the procedure to formalise, please refer to question 2.2 above.

2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Security interest may be granted over shares/equity quotas for

companies incorporated in Mexico. Typically, the vast majority of the shares/issued by a Mexican incorporated company will be transferred to the corpus of a Security Trust and the *de minimis* portion of the issued shares/equity quotas will be covered by a Pledge Agreement. The aforementioned is carried out to comply with the requirement under Mexican law of having at least two shareholders, since transfer of shares to the Security Trust is considered a transfer in property.

The shares must be endorsed (i) in favour of the lender under the Pledge, and (ii) in favour of the trustee in terms of the Security Trust. All endorsements shall be registered in the applicable corporate ledgers.

For further reference, equity quotas (for Mexican Limited Liability Companies) are not endorsed, since the same are not physically issued, and only require recording in the applicable corporate ledgers.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Notarial and registration fees related to security granting agreements (Pledges, Mortgages, NPPA and Security Trust) vary from state to state. Usually, Public Notaries in Mexico have an established maximum for fees which varies from state to state, although states may offer discounts depending on the project that is being carried out and for which the Security Granting Agreements are being executed.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The recording in the RUG can be completed on the same day it is filed.

For securities that must be registered in local public registries, recording time varies depending on how effective the local registry office is.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Governmental approval might have to be requested for assets related to governmental property (i.e., rights of way on federal land, water supply agreements, etc.).

Additionally, depending the nature of the project (energy, telecommunications, etc.) authorisation from the relevant authority might be required (i.e., PPAs executed with CFE require that consent be obtained before creating a lien over the project assets).

3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The trustee of a Security Trust in Mexico may be granted sufficient powers and authority to carry out an enforcement procedure, in the

event of an occurrence of an event of default, and distribute proceeds, taking into account the enforcement waterfall established in the Security Trust. It is typical to include provisions in the Security Trust, whereas, upon the occurrence of an event of default, the Collateral Agent (the beneficiary in the first place) will request the trustee to carry out the enforcement procedure established in the Security Trust.

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in our jurisdiction.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?

There are no significant restrictions that may impact the timing and value of enforcement. Although, in the specific case of government-sponsored projects, lender step-in rights must be authorised (usually by proving financial and technical capacity to operate the project).

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Restrictions may only apply for restricted sectors that limit the participation of foreign ownership.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

The Mexican Federal Bankruptcy Law is the applicable law governing reorganisation and bankruptcy procedures in Mexico. A bankruptcy/reorganisation procedure in Mexico may directly impact the enforcement of security for a lender.

The Mexican Federal Bankruptcy Law (subject to exemptions and rights) will treat a secured lender as a secured creditor, which is important, since such capacity grants a secured creditor, among others, priority in ranking, loan currency protection, continued accrual of interests and the ability to participate in the eventual creditor agreement (which concludes the reorganisation proceeding). In the event the aforementioned creditor agreement is not reached, a bankruptcy proceeding shall take place and the company's assets will be liquidated to carry out the payment of debts owed to the acknowledged creditors.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

The creditors which hold an *in rem* security over assets, which may be foreclosed for the payment of the corresponding debt, have a priority position in the bankruptcy proceeding's payment waterfall.

In cases where multiple secured creditors exist, the date of registration of the security interests will dictate the priority of payment to the relevant creditors.

When the security interests are not duly registered, the corresponding creditors will be considered as unsecured creditors and will be paid after the secured creditors, if the remaining assets allow the payment of the amounts owed to the unsecured creditors.

Creditors who have expressly permitted to be considered as such, affiliates of the debtor without secured debt, and debtor officers and board members without secured debt, will be considered subordinated debtors and will hold a priority level below unsecured creditors.

Additionally, pursuant to the Commercial Insolvency Law, the issuance of the insolvency resolution entails the acknowledgment and effectiveness of a general retroactive claw-back period of 270 calendar days (or 540 for other transactions with affiliates, directors or senior officers of the company, or their relatives) from such issuance; the appointed conciliator for the procedure or acknowledged creditors may request the district court to extend the claw-back period in justified circumstances, which shall not exceed three years. Certain acts or transfer of assets may be considered fraudulent and in prejudice of creditors and their rights, if such acts are unjustified and adversely affect the project company's financial position.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Pursuant to the Commercial Insolvency Law, Mexican insurance and bonding companies will be excluded from bankruptcy proceedings; all other commercial entities will be subject to bankruptcy proceedings.

For governmental entities, only commercial entities with government participation may be subject to bankruptcy proceedings; other than those mentioned, no governmental agencies or public entities may be subject to bankruptcy proceedings, and their assets may not be seized or intervened.

The possibility of having state productive companies, such as Pemex and CFE, subject to bankruptcy proceedings is questionable.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Pursuant to Mexican law, seizing assets outside of court proceedings is not allowed. Such acts or actions to seize assets from an individual or company shall be approved and carried out by the relevant courts following the procedural rules.

While a bankruptcy procedure is underway, the seizure of assets is forbidden, except for the court-approved preventive measures in order to guarantee the payment of credits in certain cases.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Foreign creditors are equal to local creditors regarding bankruptcy

proceedings. Additionally, Mexican law allows the acknowledgment of procedures carried out abroad and assistance requests by a foreign authority in connection with a procedure being carried out in Mexico. In such cases, the procedures provided in the Commercial Insolvency Law are applicable, unless otherwise provided by international treaties or if there is not international reciprocity.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

There are not any. Notwithstanding the aforementioned, directors of publicly held companies have duty of care and duty of loyalty.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Ownership restrictions may only apply for restricted sectors, which either: (i) reject participation of foreign investors over specific sectors (i.e., transmission and distribution of electricity as public services, nuclear energy); or (ii) limit participation of foreign investors over specific sectors (i.e., ports).

Mexican law does not currently contemplate restrictions, controls, fees and/or taxes on foreign ownership.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

There are multiple bilateral investment treaties and free-trade agreements to which Mexico is a party to, which protect foreign investment (i.e., the North American Free Trade Agreement).

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Nationalisation and expropriation are contemplated by the Mexican constitution, the Expropriation Law and other administrative laws.

Expropriation is permitted to the extent that the same is carried out for public purposes only and an indemnification be granted to the affected party, which shall be on market value terms. Furthermore, bilateral treaties and agreements executed by Mexico with foreign nations protect foreign investment from arbitrary national actions.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Generally speaking, the main investment projects in Mexico will require the authorisation of certain entities which are in charge of supervising general aspects of the market or the public interest, such as: (i) The Ministry of Economy; (ii) The Federal Antitrust Commission; (iii) the Ministry of Environment and Natural Resources; and (iv) The National Water Commission.

The energy practice, which has seen a recent boost in its activity, requires the participation of the following government agencies or departments: (i) The Ministry of Energy; (ii) The Energy Regulatory Commission; and (iii) The Federal Commission of Electricity, which shall oversee the performance of the power-generating agreements, power transformation, distribution, and the granting of the relevant authorisations related to such agreements, among others.

Other sectors, such as communications infrastructure, toll roads, among others, are regulated by The Ministry of Communications and Transportation.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

As in our answer to question 7.1 above, depending on the regulation for the relevant project, the filings and authorisations must be requested to the corresponding governmental entities.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

A private party interested in exploiting natural resources shall request the right to do so, and may be granted such right by means of a permit or concession (depending on the activity). As a general rule, licences and permits are only granted to Mexican entities.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Fees depend on the activity that is being carried out, for instance: (i) regarding the extraction of water, the private party shall pay the fees established in relation to the volume extracted; (ii) for hydrocarbons, private parties carrying out the exploration are subject to paying a percentage depending on the gross value of hydrocarbons produced; and (iii) for the extraction of minerals, fees are determined taking into consideration the surface of the property, which shall be multiplied by a specific factor.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Mexican law does not currently provide for any restrictions on foreign currency exchange.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions or controls for the repatriation of investments. Notwithstanding the foregoing, remittances by foreigners may be subject to tax withholdings at the current applicable rates determined in the Mexican Income Tax Law (*Ley del Impuesto sobre la Renta*).

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

There are no restrictions for the payment of dividends pursuant to Mexican law; however, taxes or other concepts may apply depending on the jurisdiction of the parent company.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

As mentioned before, the Ministry of Environment and Natural Resources is in charge of reviewing the risk and environmental impact statements, which are regulated by the General Law of Ecologic Balance and Environment Protection.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

The main framework for projects related to government entities is provided by the following regulations:

- Public Works and Services Law (*Ley de Obras Públicas y Servicios Relacionados con las mismas*), which regulates the public works for improvement, development, construction and maintenance of public services and infrastructure.
- Public Acquisitions, Leases and Services Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), which regulates the acquisitions, leases and services agreements which the Federal Government will enter into with private parties through public bids and direct awards, among others.
- Public-Private Associations Law (*Ley de Asociaciones Público Privadas*), which regulates the creation of associations, joint ventures and other types of joint relations between private and government parties.

Additionally, there are other regulations which contain the relevant framework for the procurement of projects on specific sectors (i.e., Hydrocarbons Law (*Ley de Hidrocarburos*) and the Electric Industry Law (*Ley de la Industria Eléctrica*).

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

As a general rule, contracting foreign insurance coverage for risks in Mexico is forbidden under the Insurance and Securities Institutions Law (*Ley de Instituciones de Seguros y Fianzas*). Therefore, a Mexican authorised company would be required to issue insurance in Mexico.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Insurance policies over project assets may be payable to foreign creditors, provided the foreign creditor is the beneficiary and/or loss

payee of such insurance. Otherwise, the applicable Collateral Agent shall be named as the beneficiary and loss payee, and the same shall be instructed by the creditors to transfer funds accordingly.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Pursuant to the Federal Labor Law (*Ley Federal del Trabajo*), 90% of the employees of any given entity must be Mexican nationals. 10% of the employees of any given entity may be foreigners, in the event that certain position requires a given specialty and no Mexican nationals are available to take such positions.

The aforementioned restriction will not apply to administrators, directors and general managers.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Even though Mexico is a party to several free-trade agreements, limitations to control import volumes of specific merchandise and equipment may apply.

10.2 If so, what import duties are payable and are exceptions available?

Please see the answer to question 10.1 above.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Pursuant to Mexican law, such provisions are included in the Federal Civil Code (*Código Civil Federal*) and its analogue dispositions for the states of Mexico.

Force Majeure is traditionally contemplated in the relevant project agreements when dealing with public bids.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Mexican law provides for certain prohibitions, liabilities and criminal responsibility in respect of corrupt practices. The laws which regulate such conducts are:

- The Federal Law of Public Servant's Liabilities (*Ley Federal de Responsabilidades de los Servidores Públicos*), which contains the impeachment proceeding in order to determine the liability of the public servant.

- The Federal Criminal Code (*Código Penal Federal*), which contains a series of criminal offences in which public servants may incur in the exercise of such faculties. Also, the local criminal codes contain their respective criminal offences.
- The General Law of the National Anticorruption System (*Ley General del Sistema Nacional Anticorrupción*), which oversees the creation of a National Anticorruption System in order to prevent and punish administrative misdemeanours and acts of corruption.

13 Applicable Law

13.1 What law typically governs project agreements?

Due to the nature of the projects and the number of agreements entered into, the applicable laws may vary in respect of the different agreements. Normally, the main laws which regulate the project agreements are the Public Works and Services Law (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*) and the Public Acquisitions, Leases and Services Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*).

Also, the main legal framework for the various agreements of the project will be the Federal Civil Code (*Código Civil Federal*) and the Commercial Code (*Código de Comercio*), although pursuant to Mexican law, for certain agreements, the parties may agree to submit such agreements to a different jurisdiction and applicable law.

13.2 What law typically governs financing agreements?

Pursuant to Mexican law, the financing agreements are governed by the Commercial Code (*Código de Comercio*), General Negotiable Instruments and Credit Transactions Law (*Ley General de Títulos y Operaciones de Crédito*), and the Federal Civil Code (*Código Civil Federal*), among others.

Please note that, in some cases, the parties agree for the financing agreements to be governed by New York or other foreign legislation and subject to such jurisdiction, which is an acceptable and common practice.

13.3 What matters are typically governed by domestic law?

All agreements by means of which a security is created in Mexico over assets located in Mexico and agreements related to regulated activities or regulated assets.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

A party may submit itself to a foreign jurisdiction and waive its corresponding jurisdiction.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Local courts recognise the submission to arbitration procedures,

national and international. Among the requirements for the arbitral resolution to be enforceable are, among others, that: (i) the arbitration must be agreed by the parties on the relevant agreement; (ii) the legal capacity of the parties of the agreement must be sufficient at the time of the execution of the agreement; and (iii) the resolution and the arbitration must comply with all the agreed formalities.

15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Mexico is a member to the New York Convention. Additionally, Mexico has subscribed the Inter-American Convention on International Commercial Arbitration, and just recently (as of January 2018) entered the International Centre for Settlement of Investment Disputes.

15.3 Are any types of disputes not arbitrable under local law?

Disputes arising from antitrust, bankruptcy, property law, labour and criminal law, tax and administrative law are not arbitrable.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

There are no disputes that require a mandatory domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Even though not a common practice, parties may contract insurance coverage for political risk.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Generally, withholding taxes apply to interest payable to foreign lenders, as well as proceeds resulting from a claim. The rate at which withholding shall be carried out depends on the underlying transaction.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Mexico has entered into treaties for avoiding double taxation (more than 50 countries), which have specific characteristics, privileges and restrictions.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

In general, the material issues are those outlined in this chapter.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

Entities participating as issuers of bonds or similar capital instruments shall comply with the applicable Securities Market Law and the Sole Issuers Circular (*Circular Única de Emisoras*). Investment will be subject to the oversight of the CNBV.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

This is not applicable in our jurisdiction.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

This is not applicable in our jurisdiction.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

No, its validity would stand.

**Jorge Cervantes**

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Jorge Cervantes specialises in M&A, private equity, projects, energy and infrastructure finance transactions. He has extensive experience advising parties in a wide range of complex cross-border and national transactions in Mexico, representing sponsors, developers, private equity investors, financial institutions, banks, lenders and governments on different acquisitions, dispositions, joint ventures and financings. His experience encompasses a range of transactional and regulatory work and has included some very relevant transactions involving oil and gas, power plants, renewable energy, petrochemicals, LNG, pipelines, telecommunications, real estate, hotels and infrastructure projects in general.

Jorge Cervantes' practice has been recognised by prominent international publications such as *Latin Lawyer*, *Euromoney's Expert Guides*, *Chambers and Partners*, *Who's Who Legal*, *IFLR1000*, *Best Lawyers* and *LACCA Approved*. He constantly participates as speaker in national and international project finance and energy forums.

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