

Bank Financing 2013 – Dominican Republic

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1. What are the most common forms of bank financing in your jurisdiction?

Financing in the Dominican Republic is mostly done through asset-based financing structures, which rely heavily on the underlying security package. Dominican banking legislation strongly considers the security package for purposes of risk allocation provisions. Most financing deals are usually in the form of term loans or revolving loans.

2. Are any governmental or central bank registrations or approvals required for a foreign lender (being a lender not incorporated in your jurisdiction or operating through a branch outside of your jurisdiction) to lend to a borrower in your jurisdiction?

There are no prohibitions or limits for foreign lenders to lend to a Dominican entity or person. By virtue of article 63 of the Foreign Exchange Regulations, the only formality for foreign lenders is to complete a registration procedure and inform the Central Bank about the transaction for statistical purposes only.

3. Are there any foreign exchange provisions restricting, or governmental or central bank registrations or approvals required for, a borrower in your jurisdiction to contract debt obligations in a foreign currency or to remit funds abroad?

There are no foreign exchange provision restrictions or registrations required to contract debt in foreign currency or to remit such funds abroad. Please note however that recent tax reform Law 252-12 has established a 10 per cent withholding tax on utilities, dividend and other payments made from the Dominican Republic abroad.

4. Are there any governmental or central bank registrations or approvals required for the prepayment of loans either domestically or abroad?

No governmental or Central Bank registration or approvals are required for purposes of prepayments. These provisions are contractually agreed between the parties.

5. Are any mandatory governmental or central bank deposits required to be made from loan proceeds?

Domestic banks must make regulatory risk allocation provisions for contingencies before the Banking Superintendence. Foreign banks are not required to establish any type of provision or deposits in the Dominican Republic. However, domestic banks are required to create regulatory reserves accounts at the Central Bank equal to a percentage of the total bank's public funds raised in national or foreign currency under any kind of instrument, best known in Spanish as *encaje legal*. The percentage to be reserved will vary depending on the banking licences available for financial institutions.

6. Describe any governmental measures that may be taken to declare a moratorium on the loan obligations of private companies.

There is no legal disposition or precedent, to our knowledge, upon which the government has declared a moratorium on loan obligations of private companies.

7. Describe any environmental liabilities and any other areas of lender liability that may arise as a result of the activities of a borrower or the realisation of a security interest.

The Dominican Environmental Law establishes a sanctioning system for violations or failures to comply with the Law. In case of any environmental infringement or negligence, the Environmental Ministry may take such measures as may deem necessary, such as ceasing the project operations or closing the project itself, as well as revoking environmental licenses or permits.

It is important to note that any violations of the Law shall follow in rem the project or assets of a security interest and not in personam, meaning that any sanction or punishment shall be applicable to the beneficiary of the environmental license or permit and shall not be transferred to the lender.

8. Are interest payments or loan fees subject to a withholding tax?

Yes, the amended article 306 of the DR Tax Code does establish a 10 per cent rate for interest to be paid abroad to financial institutions or individuals resident or domiciled in the country.

9. What other taxes or mandatory fees, for example, transaction, registration, or documentary fees, apply to loan transactions?

Loan agreements are not subject to any registration tax or fee. However the perfection of security documents does require certain fees, which may vary depending on the type of security. The most common fees are those relating to mortgages (2 per cent of the secured amount), for pledge registration fees and stamps, for the assignment the record before the Civil Registry with a payable stamp tax determined as to the amount assigned.

10. Are there different taxes applicable to loans repayable to lenders in your jurisdiction and loans repayable to lenders in a foreign jurisdiction?

The fundamental difference between taxes applicable to domestic and foreign lenders is that the latter will be subject to a withholding tax equal to 10 per cent over interest payments made abroad. However, domestic financial institutions are not subject to withholding taxes but rather must present and pay taxes directly to the Tax Authorities under the disposition of the Dominican Tax Code. In the event that a domestic lender were to be an individual as opposed to a corporation, then a withholding tax of 10% must be applied.

11. Is your country party to any double taxation treaties that reduce taxes payable by borrowers in respect of loan payments abroad?

Yes. The Dominican Republic is party to double taxation treaties with Canada in order to mitigate double payment of income taxes risks in different jurisdictions and tax evasion risks. However, no reductions of taxes dispositions are set therein.

12. Do any financing structures receive favourable tax treatment, such as prepayments of exports?

Currently some special laws offer a favourable tax treatment and incentives for certain markets and industries, subject to the presentation of classification requirements and approvals determined by each law and its committees and counsels. We present herein some examples of incentives of the Dominican Legislation that may encourage financing structures and a general framework regarding the exemptions and incentives offered:

- Free Trade Zone Law No. 8-90 is applicable to manufacturers of goods and services for exportation, with exemptions for over a 100 per cent of taxes such as loan agreements, registry and transfer of property, construction, customs duties and other related taxes, affecting raw materials, equipment, building materials, patent and transfer of goods tax (ITBIS, *Impuesto de Transferencia de Bienes Industrializados y Servicios*), among others.
- Tourism Law for Poor Development Areas No. 158-01. furnishes special exemptions to touristic companies established on the specified cities and provinces appointed by the aforementioned law and its amendments. Exempting the regulated companies from income tax, national and administrative construction permits, importation taxes, transfer of goods tax applicable to the first equipment, among others.
- Special Development Frontier Zone No. 28-01 grants special incentives to companies setting up in the Frontier Zone of the country to promote the zone's development. Any company established in this zone shall benefit from exemptions, such as income tax, transfer of goods tax, importation taxes, customs duties and other related taxes, imports of raw materials subject to a substantial transformation processes in the Dominican Republic, free transit payment and use of ports and airports and tax equipment and machinery. It is relevant to note that companies benefiting from this policy shall have a benefit period of 20 years.
- Textile Market Law No. 56-07 states that the sectors within the textile business (confection and accessories) and leather (manufacture of shoes and leather) that do not adhere to other special customs regime can benefit from exemptions of income tax, transfer of goods tax, among others.
- Renewable Energy and Special Regimes Law No. 57-07 is applicable to wind farms, hydroelectric plants, solar and thermal-solar plants, bio-fuels plants and biomass power plants. It gives tax benefits for importation of equipment, machinery and accessories for the production of renewable energy in Dominican Republic and exemption of transfer of goods tax, a 5 per cent reduction of interest payments tax for foreign financing, exemption of income tax for ten years, and other benefits.
- Law No. 84-99 of Promotion of Exports provides mechanisms of (i) refund of rights and customs charges, paid over specified materials, when incorporated into goods of export, or when products are returned abroad in the same condition which they joined to the customs Dominican territory; (ii) simplified compensation of customs charges, applicable to domestic and foreign entities or individuals holders of exporting companies, entitling them to a compensation of customs duties paid in advance for an amount not exceeding 3 per cent of the free on board or FOB value of goods exported; and (iii) a regime of temporary admission for perfection of assets: considered as the entry of goods to Dominican customs territory, with suspension of import duties and taxes and from abroad or from free trade zones, to be re-exported.

13. Describe any limitations on interest rates or the ability of lenders to charge default interest under loan agreements.

The parties to a loan agreement are free to agree on interest rates as well as default interest.

14. Describe any restrictions that may apply to the choice of law, for example, whether a choice of New York or English law will be recognised and enforced in your jurisdiction.

The choice of a foreign law as the governing law of financing documents is a valid and effective choice of law under the laws of the Dominican Republic provided it does not contravene any legal disposition or the public policy and good practice of the Dominican Republic. In which case, the Dominican court will not give effect to such choice of law in any action, suit or proceeding arising out of, or otherwise relating to such financing documents. Notwithstanding the foregoing, in order for a Dominican Republic court to apply a foreign law, evidence of the content of such law must be presented to the court and in absence of such evidence the foreign law would be presumed identical to Dominican Republic law.

15. Describe generally the requirements for the enforceability of a foreign judgment in your jurisdiction in respect of an outstanding loan.

A foreign judgement will only be valid and enforceable if a Dominican court recognises it. Except as such enforceability may be limited to applicable bankruptcy, insolvency, reorganisation, liquidation, moratorium, readjustment of debt or other similar laws affecting the enforcement of creditors' rights generally, such as fiscal and employee credits, and by the application of general principles of equity, regardless of whether such enforceability is considered in a proceeding at law. The judge will verify that the foreign judgement does not contravene any Dominican legal dispositions, after the aforementioned verification the Judge of the Commercial and Civil Court shall homologate the foreign judgement. If the foreign judgement involves execution measures in the Dominican Republic, the exequatur of the foreign judgement shall be requested to the judge.

16. Upon the closing of a loan, what procedural requirements (execution formalities, notarisation, registration, recordation or filing) should be observed to ensure that a loan agreement is enforceable in your jurisdiction?

The loan agreement, the security agreements and the promissory notes shall be notarised and drafted in Spanish for their filing in the corresponding registry office. Pledge or debenture agreements shall be recorded in the corresponding justice of the peace, the mortgage agreement shall be recorded in the title registry office and assignment agreements shall be notified to the corresponding party by means of bailiff's act. The Dominican Civil Code establishes that the party's obligations shall be contracted in the Dominican Republic for mortgage purposes.

17. Does a loan agreement in English need to be translated and locally registered to be enforceable in your jurisdiction?

Yes. A court shall require the translation of the loan agreement for the enforceability.

18. Must a foreign bank be registered in your jurisdiction to enforce any rights under the applicable loan documentation?

No registration is needed to carry enforcement measures.

19. Are foreign lenders treated any differently than local lenders in enforcing loan documentation in the courts of your jurisdiction?

No, Dominican courts render equal treatment. In the past, a foreign person or entity was obliged to deposit a foreign's bail (*fianza judicatum solvi*) in order to demand justice before a Dominican court. The Corporate Law No. 479-08 and its amendment, as well as the Supreme Court's case law have now abolished this measure.

20. Is consideration required for the enforceability of a contractual obligation or guarantee?

Consideration is required for the enforceability of a contractual obligation. In the case of the borrower, consideration is evident through the disbursement of the loan on its behalf from the lender. However in the case of a guarantee, consideration may not always be as evident. To such regards Dominican case

law has proven that the term consideration may be established through a broad interpretation, which ultimately will require some type of commercial interest between the guarantor and the person on behalf of whom the guarantee is being created.

21. To enforce a loan in your jurisdiction, need the loan be evidenced by a promissory note or other form of *título ejecutivo*?

Not necessarily. The loan agreement itself can be enforceable before Dominican courts requesting the payment of the owed amounts and the judgment obtained shall constitute an executive title, nevertheless this process implies a considerable quantity of time for the enforcement. In order to reduce the enforceability procedures of the loan, it is of common practice to evidence every disbursement and make the loan be enforceable and the security claimable. It is important to note that under Dominican legislation executive titles are: first copies of judgments and other judicial decisions, as well as its subsequent judgments replacing the first decision, notary deeds containing payment obligations and simple promissory notes. These latter acquire the executive force resultant of the power of the judge who imposes or allows resorting directly by the public force to obtain the fulfillment of the obligations or prescriptions contained therein.

22. To enforce a guarantee (*aval*) in your jurisdiction, is it necessary that the guarantee be evidenced by a guarantee agreement or other form of *título ejecutivo*?

Not necessarily. The Civil Code establishes that the parties can verbally contract obligations. However, this criteria lacks practical enforceability provided that its opposability shall be questionable towards third parties. Therefore, in order to enforce any guarantee, valid written evidence should be presented in order to be opposable and executed under Dominican Law.

23. Are there any restrictions on loans to multiple borrowers or on a guarantee in respect of a loan to an affiliated entity?

There are currently no restrictions regarding multiple borrowers loans. It is relevant to establish the distinction between several obligations and joint obligations. The latter, implies the payment shall be divided between the borrowers, to their option, or the creditors in proportion to their credit, in several obligations the payment is duly and entirely owed to the creditor.

24. Can a party grant a secured or unsecured guarantee in respect of a loan to an unaffiliated third party?

There are no restrictions regarding guarantees to unaffiliated third parties. Nevertheless, the case law has established a need for some type of commercial relation as a sufficient element for consideration.

25. Is there a distinction between the granting of a security interest and the perfection of a security interest?

The granting of a security interest shall be created by an agreement to assure the performance of the borrower to cover the debt or other obligations. Essentially the distinction is the registry of the security interest and its opposability towards third parties.

26. What is the most common form of granting and perfecting a security interest in moveable assets?

The most common form to grant a security interest in moveable assets, such as inventory and machinery, is by pledge or debenture over the goods (*prenda sin desampoderamiento*). In order to grant this guarantee, the parties shall subscribe to a pledge agreement. Conducive to the enforcement of the security, the pledge agreement shall be recorded in the corresponding justice of the peace and follow the applicable legal procedures. This process shall end in either a public auction of the assets or its adjudication in favour of the creditor through a court order. The Law No. 6186 regulates the aforementioned procedure. Other forms to grant security interest in moveable assets are deposit deeds and warrants, which are also established under Law 6186.

27. What is the most common form of granting and perfecting a security interest in real estate?

The most common form of granting a security interest in real estate is by mortgaging the property. The parties shall execute a mortgage agreement, which shall be recorded before the corresponding title registry office. In order to record the mortgage agreement, a tax of 2 per cent of the value of the property shall be paid to the tax authorities. In case of various mortgages over a property, the rank of the mortgage shall determine which mortgage prevails. The rank of the mortgage is determined by the filing date, for example, when the first rank mortgage is paid, the second rank mortgage shall be paid with the residual, if any exists.

The procedure for collecting a debt guarantee by a real estate mortgage is by real estate foreclosure (*embargo inmobiliario*), which seeks to end in a public auction of the seized property or by a judicial adjudication in favour of the creditor in the absence of bidders. Under Dominican law, the provisions of the Civil Code and Civil Procedure Code govern the ordinary foreclosure procedures, while both Monetary and Financial Law No. 183-02 and Mortgage Market and Trust Law No. 189-11 provide special summary procedures.

28. What is the most common form of granting and perfecting a security interest in receivables and accounts?

The most common form is by assignment of receivables and accounts. In this case, the parties shall execute an assignment agreement and notify the agreement by bailiff's act to the assigned party.

29. Does your jurisdiction recognise the transfer of assets to a trust for the benefit of a lender as a means of granting a security interest in such assets?

The Dominican Republic has passed the Mortgage Market and Trust Law No. 189-11 (*Ley de Desarrollo del Mercado Hipotecario y Fideicomiso*), which establishes the possibility of a security trust to secure the performance of determined obligations of a settler or a third party. The beneficiary or creditor shall request to the trustee the enforcement or foreclosure procedures set forth on the trust's act.

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30. Does your jurisdiction recognise the fiduciary transfer of assets (such as an *alienação fiduciária*) to a lender as a means of granting a security interest in such assets?

Yes. The fiduciary can grant a security interest over the assets or properties held in trust for the purposes of undertaking the obligations assumed by the trustee in benefit of the trust. Upon the event of default the fiduciary can transfer the assets or properties held in the trust directly to the creditor, which implies a disadvantage towards other creditors to collect from the borrower's assets.

31. Are there any types of asset that cannot be pledged as collateral under the laws of your jurisdiction?

There is no prohibition, provided that the assets are not related to any illegal action.

32. Describe any restrictions on enforcement of security. For example, any statutory regime that may stay the enforcement of the security or provide that enforcement is limited to public sale through the courts.

Mortgage and debenture securities enforcement are subject to a due process of the public sale of the assets or property. It is relevant to point out that the creditor will not be able to simply appropriate the assets or property, such measure is prohibited under Dominican law and is known as *pacto comisorio*.

33. Describe any other relevant legal considerations in connection with loans to a borrowers in your jurisdiction.

The most relevant piece of legislation is most likely the creation of the security agent through Law 189-11. Under Law 189-11 an applicable security agent may, to the benefit of all lenders current or future, represent and hold security for a determined transaction. Upon a foreclosure procedure, the security agent is also able to transfer any property to the lenders free of any additional taxes. This figure will surely enable syndication of larger deals in the Dominican Republic as prior to Law 189-11, it was advisable for each lender to directly register security in its name in order to avoid any litigation by procurement considerations. Although Law 189-11 has been in effect for over a year, the regulator has yet to pass the applicable ruling regarding security agents and therefore has delayed the implementation of the instrument.