



# Real Estate

in 32 jurisdictions worldwide

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# 2012



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# Dominican Republic

Juan Alcalde and Vilma Santana

OMG

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## TRANSFER OF REAL ESTATE

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### 1 Legal system

How would you explain your jurisdiction's legal system to an investor?

The Dominican Republic legal system is based on civil law. The primary sources of law are a systematic compilation of the principles of law in various codes, including the Civil, Commercial, Civil Procedure and Penal Codes, and all the special laws enacted by the Congress of the Dominican Republic.

All court decisions shall be rendered in accordance with these codes and laws; nevertheless, in their decision-making process, Dominican judges might cite or take into account precedents established by prior court decisions. Dominican courts do not rule in equity. Judges are allowed to interpret broad general provisions but always applying the code or the statutory law.

The Dominican real estate property system is based on the Torrens title system that originated in Australia under common law principles. In this system of land title, registration of land guarantees an indefeasible title to those included in the land register. In addition, registered properties rights are binding and enforceable against third parties once said rights have been registered.

Under the Dominican Republic legal system, a party can obtain an injunction to prevent or to put an end to an unlawful action. In real estate matters, this injunction is expressly provided for in Real Estate Law No. 108-05 as a provisional measure obtained before the land court, aimed at preventing an eventual damage or eliminating any unlawful or excessive disturbance. Initially, the law allows the judge to order these provisional measures *ex parte* but also *sua sponte*.

In the Dominican legal system, if there is an agreement, its terms are binding and enforceable by and between the contracting parties; if there is a controversy regarding the agreement terms and interpretation, the judge's only option is to interpret those clauses that are too broad, unfair, excessive or ambiguous; such interpretation must always be in accordance with the code and the applicable law.

Some oral agreements are expressly recognised by Dominican law, such as leases, labour contracts and mandates; however, in real estate transactions, a written agreement is required by the land registry in order to register or record an investor's property right over a real estate asset.

### 2 Conveyance documentation

What are the legal requirements for documents recording conveyance?

In order to record a property conveyance, the following documentation must be filed at the land registry that has jurisdiction over the real estate property:

- real estate purchase sale contract duly notarised by a notary public;
- original of the title deed certificate regarding the property involved in the transaction;

- evidence of payment of the real estate property transfer taxes (either 3 per cent of the price set forth in the purchase agreement or in the appraisal made by the Dominican tax authorities – whichever is higher). These taxes are usually paid by the purchaser, unless agreed otherwise;
- evidence from the Dominican tax authorities that the seller is up to date in paying the taxes related to the property;
- copy of the identity card or passport of the parties, or taxpayer's card if a legal entity is involved in the transaction;
- if a legal entity is involved in the transaction, the corresponding corporate resolution duly certified by the corresponding mercantile registry; and
- taxes and stamps.

There are no variations in the requirements from province to province. However, every land registrar has certain discretionary powers regarding the validity of the documentation filed.

### 3 Foreign investors

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Dominican law and government regulations do not restrict the ownership of real estate properties by entities or individuals that are not legally resident in the Dominican Republic.

However, any foreign entity that intends to own real estate in the Dominican Republic must register a branch office in the country. This entails registering the entity in the mercantile registry and subsequently registering the entity before the Dominican tax authorities. Such entity's reporting treatment is similar to that of national entities. This means that a foreign entity with a branch registered in the Dominican Republic must pay the applicable annual taxes on the property and, in accordance with any additional operations in the country (if any), file the proper income return and VAT as may be applicable.

### 4 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues? What about repatriation of capital?

There are no exchange control issues in our jurisdiction; the Monetary and Financial Law No. 183-02 sets forth a free convertibility system. In this regard, there are no restrictions for repatriations of profits or capital in foreign currency, as explicitly provided in the Foreign Investment Law No. 16-95.

### 5 Legal liability

What types of liability does an owner of real estate face? Is there a standard of strict liability and can there be liability to subsequent owners? What about tort liability?

Under Dominican law there are two main types of liabilities: contractual and extra-contractual. Regarding extra-contractual liabilities,

the Dominican Civil Code establishes a legal presumption of liability against the owner of a building for damages caused by the building's ruin when such damage has occurred due to the owner's gross negligence or any construction vice or defect.

Regarding tort liability, the parties claiming damages shall have to prove gross negligence, wilful misconduct or breach of the due standard of care by the landowner in connection with the property to obtain an award of damages.

Certain activities and real estate property projects must comply with the terms and conditions set forth by Environmental Law No. 64-00 in order to avoid any environmental liabilities such as fines, or limitation or restriction of activities causing potential environmental damages.

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## 6 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

The Dominican legal system, specifically Law No. 146-02 on Insurance and Bonds, provides real estate owners with a wide range of ways to protect themselves from any liability that may arise. The most common insurance policies are those against property damages, including damages caused by acts of nature and third-party damages claims.

Regarding environmental problems, and activities or projects that require environmental permits or licences under Environmental Law No. 64-00; in order to guarantee the fulfilment of the environmental permit or licence, as applicable, a performance bond equivalent to 10 per cent of the overall costs of the necessary infrastructures or investments is required to be paid in order for the owner or developer to be able to execute the programme of environmental management.

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## 7 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction?

Dominican law allows the contracting parties to choose the law that will rule the contract, except for those cases where public policy matters prohibit this. However, in a transaction regarding real estate where a conflict of laws may arise, the Dominican Civil Code sets forth an explicit rule following the international private law rule of *locus regit actum*, stating that real estate located in the country, even if owned by foreigners, will be ruled by Dominican law.

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## 8 Jurisdiction

Which courts have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Real Estate Law No. 108-05 attributes exclusive jurisdiction to the land court of the territory where the property is located to hear cases regarding registered real estate property disputes. The Dominican land courts are divided into two categories: lower courts called original jurisdiction land courts, which are one-judge courts that hear all matters regarding real estate properties at first instance; and higher courts called superior land courts, which are five-judge courts that hear appeals of the decisions rendered by the original jurisdiction land courts. Decisions of the superior land courts can be appealed to the Supreme Court of Justice.

In order to be valid, all legal claims shall identify the involved parties.

Claims between national parties are served by bailiffs. In cases involving a foreign party there is a special procedure regarding service of process, which is carried out through the district attorney's

office of the corresponding ruling court. Service is delivered through official correspondence to the Ministry of Foreign Affairs, which then delivers the service through official correspondence to the Dominican consulate closest to where the foreign party is domiciled.

However, it is important to note that the Dominican Republic has signed a number of international conventions in judicial assistance with certain countries simplifying the above-mentioned special procedure, whereby the central authority to serve notifications in a foreign country is the authority designated by each party to the convention via the Dominican Supreme Court of Justice.

A foreign party does not need to be qualified to do business in the jurisdiction in order to enforce legal remedies in the Dominican Republic; however, according to article 16 of the Civil Code, a non-resident foreigner acting as principal plaintiff in any matter before any Dominican court might be required to present a *judicatum solvi* bond as guarantee that any costs or damages resulting from the legal action brought by him or her will be covered. It must be addressed that this bond has been partially abolished by some special laws, such as real estate law and company law. The *judicatum solvi* bond has also been discarded in the conventions in judicial assistance that the Dominican Republic is a party to.

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## 9 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Investment entities undertake business in our jurisdiction by registering a local branch of a foreign entity or by incorporating a local Dominican company. There are no pass-through entities for tax purposes in our legal system; therefore, all for-profit business associations, regardless of their form, are subject to payment of tax.

The vehicles and entities that best protect shareholders from liabilities are a Dominican stock company (SA), a limited liability company (SRL) or a simplified stock company (SAS). An individual proprietorship with limited liability (EIRL) is also available in the Dominican Republic. These types of association grant limited liability (to the extent of their investment) to their shareholders.

Investment entities may also take the form of a Dominican branch of an offshore company.

Law No. 189-11 for the Development of the Mortgage Market and Trust was recently enacted and provides the possibility of investing via a trust (*fideicomiso*) that has certain similarities to the common law trust. Like the common law trust, the *fideicomiso* is created by a settlor who transfers some or all of his or her property to a trustee, who holds that trust property for the benefit of the beneficiaries. The fund is governed by the terms under which it was created and the trust property is separate and independent from the assets of the settlor, trustee or beneficiary; therefore, said trust property is not within the scope of the right of foreclosure of the creditors of said settlor, trustee or beneficiary. There are some tax exemptions regarding its creation, maintenance and termination; however, transfer tax shall be paid.

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## 10 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

The most common ways in which foreign investors do business in the Dominican Republic are either by incorporating a Dominican company or by registering a local branch of an offshore company (usually an international business company) or of a foreign entity. The enactment of Law No. 479-08 on Business Associations and Individual Proprietorship with Limited Liability, amended by Law 31-11, has brought about certain types of entities that are starting to be widely used, more specifically SRLs, recommended for medium-sized investments due to their flexibility, and SASs.

However, it must be mentioned that it is still common for investors to do business via a branch of an offshore company due to the following reasons:

- it is easier to handle offshore transactions;
- some exemptions apply (referred to in question 11); and
- there is less fiscal cost in the case of capitalisation.

### 11 Organisational formalities

What are the organisational formalities for creating the above entities?

What requirements does your jurisdiction impose on a foreign entity?

What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The process of incorporation will depend on the chosen entity (SA, SRL or EIRL); nevertheless, Dominican companies shall fulfil the following requirements:

- drafting and execution of the incorporation documents (bylaws, initial consents, etc);
- registration of the trade name before the National Office of Industrial Property;
- payment of taxes regarding the company's authorised capital;
- registration with the mercantile registry (some fees are applicable); and
- registration with the tax authorities.

For public companies, additional requirements apply, and filing before the Superintendence of Securities is also required.

Dominican and foreign companies receive equal treatment under Dominican tax law, as long as the foreign company had registered its local branch in the country; such branch is subject to the same income tax rate as local corporations (currently 29 per cent). It must be mentioned that all local and foreign individuals, corporations and business associations must pay taxes on income generated from Dominican sources. In addition, for foreign companies, taxable income of Dominican source (except payment of dividends from abroad or to non-residents, as well as interest of Dominican source paid to financial institutions located outside the Dominican Republic, as long as they are assumed and paid offshore) is subject to a 29 per cent withholding tax.

### 12 Documentation

Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?

Dominican law recognises any form of agreement between parties, as long as that agreement does not affect public policy matters. Regarding the execution of non-binding agreements before the execution of a binding contract of sale, this will depend on the type of transaction; if it is a simple real property purchase sale agreement, it is not customary to execute a prior non-binding agreement, such as a letter of intent; what sellers generally do is establish certain conditions precedent in order for that purchase sale agreement to be enforceable. When dealing with a development project involving different partners, investors and real property acquisition, it is more common to execute a non-binding agreement such as a letter of intent; however, such non-binding agreement shall expressly state that it is not binding and that the consent to sell has not yet been granted, because under Dominican law, when there is an agreement upon the price and object of sale, it is construed that the sale has been executed. It should be noted that these non-binding agreements are not expressly regulated under any particular statute.

Taking this into account, if the parties expressly state that the agreement is not binding, the agreement will not be enforced by any court of law.

It is not customary in the Dominican Republic to negotiate and agree on a term sheet rather than a letter of intent; nevertheless, term sheets are commonly used in transactions involving credit facilities and financial institutions, and these term sheets are usually binding between the parties.

While in negotiation, it is customary to take the property off the market by means of executing a promise to sell or a put option agreement where the potential buyer is asked to make a security deposit, which will be credited to the price if the transaction is finally executed. This security deposit usually represents 10 per cent of the purchase price and usually, if the buyer decides not to proceed with the sale, the seller is entitled to retain the security deposit as a penalty. This penalty, in order to apply, shall be expressly agreed by the parties.

### 13 Contract of sale

What are typical provisions in a contract of sale?

As stated previously, the parties have the right to agree on any provision as long as it does not affect any public policy matter; however, any real estate purchase and sale agreement must necessarily include the agreed purchased price and the form of payment; a description of the property; and a description of the parties.

There are other customary provisions, such as representations and warranties, including those against hidden vices on the property; delivery of the property; and a *privilegio del vendedor no pagado*, which is a lien for the purchaser if the price was not paid in full but the title deed was effectively delivered to the purchaser at closing.

With respect to down payments, these may vary on a case-by-case basis but the usual range of a down payment is between 10 and 50 per cent of the total purchase price. Escrow agreements are very common in our jurisdiction, and especially when a large part of the payment is subject to certain conditions. As mentioned above, a seller in our jurisdiction is entitled to the *privilegio del vendedor no pagado* if the title deed was delivered to the buyer at closing.

In terms of evidence of good title to the property, any buyer shall require the title deed or certificate of title and a certification of status of liens and encumbrances on the property issued by the land registry where the property is located. The buyer may require other evidence, such as surveys and tax certifications. All this evidence shall be provided at the seller's expense; however, the buyer may also obtain, at no cost, some non-official information about the status of the property at the consulting room of the land registry.

Clauses regarding representations and warranties are beginning to be common in our jurisdiction as a result of all the global transactions that now take place, especially those where a party from a common law country is involved. Some standard representations and warranties clauses are:

- the seller has all legal rights with respect to the property and good title, and the property is free of any liens and encumbrances;
- the seller warrants that possession of the property will be delivered to the buyer in accordance with the Civil Code provisions;
- the property has not been leased, given as put-option, nor is it in use or occupied, whether legally or not, by any third party;
- the seller is up to date in any and all payments of tax and for utility services in connection with the property; and
- there are no claims or litigations in progress that may affect the property. A type of indemnification clause is usually inserted in this representation.

Prorations are not applicable in our legislation, but contractually there is a possibility of reflecting them in the purchase price, though this is not customary. Regarding the tax year, there is a choice between four closing dates:

- from 1 January to 31 December;
- from 1 April to 31 March;

- from 1 July to 30 June; and
- from 1 October to 30 September.

The corresponding statement shall be filed within 120 days after the closing date.

Regarding who bears the risk of loss until closing, two factors need to be taken into account: under Dominican law, when there is an agreement upon the price and object of sale, it is construed that the sale has already taken place; and the maxim *res perit domino* is applied in our legal system as a precedent, whereby in the case of loss of the property, the loss is borne by the owner; therefore, a buyer can be considered as owner once there is an agreement upon price and object, even if there has not been delivery of the possession or transfer of the property. Therefore, it shall be expressly addressed in the agreement that the sale will be perfect subject to the fulfilment of certain conditions precedent.

#### 14 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Clauses regarding environmental clean-up are rare in ordinary transactions in our jurisdiction. However, long-term environmental liability and indemnity clauses are commonly used in real estate project financing agreements, where the borrower or developer usually takes responsibility for environmental clean-up and strict compliance with environmental regulations.

The typical general covenants regarding environmental liability are the following: no material adverse change to the environmental situation of the property as a condition precedent for disbursement; no conditions or circumstances associated with the property exist that could result in a violation of the applicable environmental regulations; and environmental licences and permits must be kept in full force by the borrower, etc.

In the event of breach of these provisions (event of default), the parties usually have agreed on an environmental indemnification clause that defends and hold harmless the lender against any damage or loss in connection with any cost or liability originated by the default of the borrower's environmental-related obligations.

#### 15 Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

When there is a lease involved, the customary representations are the existence of said lease; that there are no defaults; and the commitment of the buyer to respect and comply with the terms and conditions of said lease (most lease agreements state that if the real property is sold, the buyer shall respect the terms and conditions of the lease). In the case of a new landlord, if there is a lease in force and effect and the landlord and tenant agreed that the sale of the property was a cause of termination, the only choice for the tenant will be to negotiate a new lease agreement with the new owner as landlord, but the tenant is entitled to claim damages from the seller under the rules provided by the Civil Code. If the sale of the property is not a cause of termination in the lease agreement, the buyer is bound to the lease as outlined above.

Buyers typically may insert some covenants for the seller regarding leases, specifically those seeking the early termination of the lease and indemnification for any cost or liability regarding the lease, or

even negative covenants seeking to prevent the seller from entering into any kind of lease until closing or during the term of the financing agreement.

It is not common that representations or covenants regarding leases include brokerage agreements; in fact, brokerage negotiations and agreements in this jurisdiction are usually completely separate and do not affect negotiations and execution of purchase sale contracts. Estoppel certificates do not exist in our jurisdiction; nevertheless, potential buyers do require information regarding leases and usually negotiate the insertion of the corresponding representations and covenants in this regard in the contracts.

#### 16 Leases and mortgages

Is a lease generally subordinate to a mortgage pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a mortgage upon foreclosure? Do lenders typically require subordination and non-disturbance agreements?

A lease is not subordinate to a mortgage pursuant to the provision of the lease or vice versa; however, when the lease is recorded at the land registry prior to the mortgage, the creditor shall honour the lessee's right to use the property; nevertheless, that does not prevent the right of the creditor to transfer the property rights in his or her favour in the event of mortgage foreclosure. Lenders may typically require the insertion of covenants that prohibit the lease of the property, and if there is a breach of that covenant such breach might be considered an event of default of the credit facility.

#### 17 Delivery of security deposits

What steps are taken to ensure delivery of security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets?

There is no specific procedure to ensure delivery of security deposits to a buyer in this jurisdiction when the property involved in the transaction is affected by a lease.

Security deposits are very common under a lease. Unless otherwise agreed by the parties, a cash deposit by the lessee of the equivalent of one month's rent for one-year term lease agreements and two months' rent for one-and-a-half to two-year term agreements is customary in the Dominican Republic. Regarding house rental, an amount of one month's rent applies as a security deposit. It is mandatory to keep security deposits with Banco Agrícola. Failure to observe this rule will make it impossible to initiate any procedure of eviction while this situation remains.

In our jurisdiction, security deposits do not adopt the form of a letter of credit but instead are cash deposits. Leases are not subject to periodic resets based upon appraisals, as is the case in some other jurisdictions. Instead, lease agreements usually provide a yearly increase in the rent in a fixed percentage or with reference to the national year-on-year inflation as published by the Dominican Central Bank.

#### 18 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Does your jurisdiction provide statutory priority for recorded instruments?

The typical and customary method of title searches is the performance of the corresponding legal due diligence where buyers request the delivery of the certifications of liens and encumbrances issued by the corresponding land registry.

Insurance companies (both local and subsidiaries of foreign title insurers) provide services in order to provide protection against bad title. Opinion letters are not commonly used in real estate transactions, but they are very often requested when international project financing is involved.

The Dominican Republic real estate system follows the principle of 'first in time, first with right', granting statutory priority for recorded instruments based on the date of their filing or registration.

### 19 Structural and environmental reviews

Is it customary to arrange an engineering or an environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available? Is it customary to obtain a zoning report or legal opinion?

Whether or not engineering or environmental reviews are arranged will depend on the type of project involved in the transaction. For mixed-use projects, real estate developments and infrastructure projects, these reviews are common in order to verify the condition and structure of the land, and a project's potential environmental impact.

Regarding environmental reviews, Environmental Law No. 64-00 expressly states which projects and activities require an environmental assessment; these assessments are carried out through the following instruments:

- environmental impact declaration (DIA);
- strategic environmental assessment;
- assessment of environmental impact;
- environmental licence or permit (or both); and
- public referendum.

Representations and indemnities are customary when dealing with environmental and construction liabilities. Information regarding the requirements for guaranteeing the fulfilment of any applicable environmental permits or licences can be found in question 6.

Obtaining a zoning report or legal opinion is not customary in the Dominican Republic; however, when dealing with touristic projects, mining projects and other projects, and where foreign investors and financing are involved, these legal opinions are usually requested.

### 20 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lawyers usually review the lease agreements. The most common issues regarding leases are the price and rental security deposit, lease term, treatment of improvements and automatic renewals (including automatic price updates clauses), use of property, maintenance and repair, inspections, taxes and other charges. Management agreements are very common in the jurisdiction due to the significant impact of the hospitality industry on the national economy. They are widely used for the management of resorts and hotels.

### 21 Other agreements

What other agreements does a lawyer customarily review?

Lawyers will usually review all of the agreements in connection with real estate operations. The most common ones being the following: option to purchase, financing agreements, mortgage agreements, easements, service contracts for the property, property management and brokerage agreements, and also all the documentation regarding condominium regulations, when applicable.

### 22 Closing of transaction

How does a lawyer customarily prepare for a closing?

Preparation for a closing has as its primary objective the obtaining of the documentation that meets the requirements of the land registry for the authorisation for conveyance of the property as described in question 2. However, as part of the due diligence and the preparation of closing, it is customary to request a certification of the legal status of the property issued by the land registry evidencing that the property is free of liens. At the same time, if the transaction entails

financing, the applicable documentation will not be different to that described in question 2, other than the payment of the applicable taxes in order to register the mortgage in the land registry when the parties are ready for filing.

Prorations are not customary in this jurisdiction.

## FINANCING

### 23 Form of lien

What is the method of creating and perfecting liens?

Mortgage over land, and moveable assets attached to land, are created in writing (in Spanish) through the granting by the borrower or a third-party guarantor of a security interest over the registered real property. The document must be executed in the Dominican Republic. This security is perfected with the filing and registration of the mortgage at the corresponding land registry depending on the location of the property. Upon completion of the registration process, a creditor's certificate is issued in favour of the lender. The mortgage is cancelled once the loan is repaid in full or as the result of adjudication.

The process for the creation and perfection of pledges varies depending on the type of pledge. A security interest over moveable assets is created through the execution of a pledge without a disposition agreement. In order to become enforceable, this agreement (which may be executed in a foreign language but must be translated by a judicial translator for registration purposes) must be filed before the corresponding justice of the peace. The security is cancelled upon payment or adjudication. Security interest over bank accounts opened in the Dominican Republic is created with the execution of a pledge agreement. Such agreement is notified by a bailiff notice to the corresponding bank. Security interests over stocks are perfected by the inscription of the pledge in the share book and the annotation on the share certificate. It is also advisable to register the security interest at the Office of Commercial Registry in order to keep third parties duly aware. The termination of this security occurs when repayment has occurred in full or as the result of adjudication. Pledges over stock, bonds or papers are possessory.

### 24 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Lenders from another jurisdiction making a loan secured by collateral in the Dominican Republic do not need to qualify to do business in the country. However, the enforcement of security interests, more specifically the execution of real estate mortgages and a potential adjudication of the collateral after the corresponding public auction, could end in the need to register a branch in the Dominican Republic for the lender to own the adjudicated real estate.

Mortgage taxes are 2 per cent of the amount of the loan and are to be paid upon filing of the lien at the land registry. Filing of a pledge over moveable assets involves minor out-of-pocket fees, while the notification of pledges over bank accounts and accounts receivables will only have costs related to the notification by the bailiff. These costs are not significant. Customarily, these costs are usually transferred to the borrower.

### 25 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

Loans granted by international institutions usually refer to LIBOR or Euribor rates. On the other hand, while local loans can also refer to

### Update and trends

As outlined in question 9, the hot topic in the real estate and project finance sector in the Dominican Republic is the enactment of Law No. 189-11 for the Development of the Mortgage Market and Trust. This Law seeks to improve the development of the mortgage and securities market in the country through the establishment of new legal concepts, especially the trust (*fideicomiso*).

According to this Law, common purposes for a trust include:

- wills and estate planning;
- charities;
- pension plans;
- investment and real estate development;
- assets protection; and
- public offerings, etc.

The main purpose of this Law is the development of a trust for the construction of low cost housing, and it provides an exemption of 100 per cent of the following taxes:

- income taxes;
- any tax, fee and charge that may be applicable to bank transfers and issuance, exchange or deposit of cheques;
- any applicable tax to assets, including tax over real property;
- taxes applicable to construction; and
- taxes applicable to transfer of properties, etc.

These trusts will also have the right of a compensation of the paid value added tax in the construction process.

Finally, another important feature of this Law is the introduction of the legal concept of the collateral agent.

LIBOR or Euribor rates, it is more customary to refer to the Dominican market standard rate.

There is no regulation regarding an unreasonable rate of interest in the Monetary and Financial Law, including consumer credits. However, since there is no such quantification regarding what an unreasonable rate would be, the regulations for the protection of financial services users and consumers in general protects borrowers from abusive clauses in credit agreements entered into with financial institutions. Therefore, the appreciation of a clause regarding the interest rate as abusive corresponds to the competent government agency or court.

### 26 Default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Each kind of collateral has its own enforcement procedure; therefore, 'one action' rules are not available in this jurisdiction. Foreclosures must be enforced before courts of law as provided by the Civil Procedure Code, beginning with the filing of a demand for payment of the amounts owed by the borrower before the civil court where the collateral is located. The procedure is strictly public and continues with an annotation of seizure of the property before the corresponding land registry and ends with an adjudication judgment in favour of the highest bidder. In the event that no bids are submitted, the property shall be adjudicated to the mortgagee for the first bid price and the mortgagee will be entitled to record the adjudication judgment before the land registry. This procedure takes a minimum of 120 days and can take up to more than a year. An abbreviated procedure provided by Law 6.186 of 1963 is only applicable to mortgagees that are financial institutions.

As for pledge realisations, Law 6.186 of 1963 sets forth a procedure before the justice of the peace that implies the participation of a depositary who shall be in charge of the sale of the pledged assets in a public bidding. This procedure is rather simpler than the one for the foreclosure of real estate and it takes around six months.

### 27 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

During the foreclosure and realisation procedures described in question 26, the mortgagor and the holder of the pledge continue being the owners of the property or assets. However, the creditors may request an injunction relief in order to obtain a declaration stating that the properties fall under the custody of a judicial administrator. Furthermore, the Civil Procedure Code provides that the rents and profits from the mortgaged property are immobilised in favour of the creditor, who is granted a preferential right to receive them.

### 28 Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged property or additional financing encumbering the mortgaged property or ownership interests in the borrower?

Recourse is limited to the security interest in this jurisdiction. Recourse to personal guarantors is common, since it is customary that these types of agreement provide that the obligation of the guarantor is joint and several, waiving the rights of the guarantor to demand prior exhaustion of the assets of the debtor. Therefore, in the previously described scenario, recourse to guarantors would not be limited except to the amount of the credit. As regards recourse and bankruptcy, current Dominican Republic regulation does not limit a creditor's right to pursue other assets of the borrower than those granted as collateral. However, such recourse would not benefit from any preferential rights and would be acting as a general unsecured creditor.

The only document that would create a general blanket security over the assets of the borrower would be a *pagaré notarial*, which would enable a creditor to directly foreclose on any and all assets of a borrower without a need for a court order.

However, this document is limited as to its use since:

- it does not create a preferential rank over any asset and must respect previous ranks filed over assets of the borrower; and
- it is expensive to register before the Civil Registry as a requirement to foreclosure.

In addition, it is important to stress that Dominican law sets forth wage claims and pending taxes as preferred debt.

### 29 Cash management systems

Is it typical to require a cash management system and do lenders typically take reserves?

It is not common to require a specific cash management system in loan agreements in this jurisdiction. On the other hand, lenders typically do take reserve accounts.

### 30 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Financing transactions generally do include certain credit enhancement mechanisms as a way to distribute risks between all participating parties. It is fairly customary to include completion guarantees in these agreements (which may or may not be secured by assets of the guarantor). Payment guarantees are also common and documented generally through standby letters of credit as well as holdback agreements subject to certain conditions.

### 31 Loan covenants

What covenants are commonly required by the lender in loan documents? What is the difference depending on asset classes?

Common covenants required in loan agreements are the following:

- no indebtedness – prohibition to incur additional indebtedness or to grant any collateral on any of the company's assets or properties;
- properties – prohibition to sell, transfer or alter part of the company's assets or stock;
- prohibition to merge or consolidate with any other entity;
- corporate distributions – prohibition to pay any dividends;
- change of control;
- conduct of business – the borrower is bound to conduct its business as represented to the financial institution; and
- inspection of business, assets and books of records – the borrower must permit the bank to visit and inspect as it deems necessary.

Additional covenants are customary depending on the type of loan and the business sector of the borrower.

### 32 Financial covenants

What are typical financial covenants required by lenders?

Typical financial covenants are loan-to-value ratios, debt-service coverage ratios, financial reporting requirements and cost overrun, when applicable. The lender's requirement for periodic appraisals of the borrower's assets is usual.

### 33 Bankruptcy

Briefly describe the bankruptcy system in your jurisdiction.

The Code of Commerce and Law No. 4582 of 1956 provide the bankruptcy regulations in the Dominican Republic. These regulations do not provide the reorganisation of the debtor, but mainly liquidation proceedings. Law No. 4582 requires a compulsory conciliation hearing before the chamber of commerce. If no agreement is reached in said hearing, unsecured creditors will be entitled to initiate bankruptcy proceedings against the debtor before the civil and commercial chamber of the court of first instance where the debtor is domiciled. However, the Code of Commerce demands the debtor file for bankruptcy within three days following a general cessation of payments.

There is no an explicit automatic stay in our regulations. However, if bankruptcy is declared, payments or other acts of disposition by the debtor at the time when it was already insolvent can be

deemed null by the court. On the other hand, secured creditors have the right to receive payable interest collected from the security interest. The declaration of bankruptcy by the judge leads to the removal of the officers of the debtor from the administration of the businesses of the debtor. In addition, the law imposes certain statutory ranking regarding credits for debt related to payments to employees and taxes to the government.

If and when the court declares formal bankruptcy, a trustee is appointed to conduct the bankruptcy. Once the bankruptcy proceeding is initiated, there is an additional compulsory proceeding called '*concordato*', a liquidation plan whose main purpose is to reach an agreement between the debtor and its creditors. The secured creditors may be a party to the *concordato* provided that they cancel and relinquish their collateral. Nonetheless, the *concordato* is applicable to all the credits and creditors, and must be ratified by the judge in order to be in force and be valid.

Special insolvency regimes exist for entities doing business in regulated sectors such as financial institutions, companies in the electric sector, pension funds and insurance companies.

Please be advised that Dominican Republic law on this matter is currently in the process of congressional review. The new Mercantile Restructuring Law, if enacted, would provide for a procedure similar to a Chapter 11 filing under the US Bankruptcy Code.

### 34 Secured assets

What are the requirements for creation and perfection of a security interest in non-real property assets? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The creation and perfection of a security interest in non-real property assets requires an agreement in Spanish, governed by Dominican Republic law and legalised by a public notary. A 'control' agreement is not necessary to perfect a security interest.

### 35 Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy filing, has the concept been upheld?

Our financial and monetary regulations do not require that each borrower be an SPE. Neither do lenders, nor international or national financial institutions.

The concept of independent directors of SPEs does not exist in the Dominican Republic.

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