

GETTING THE DEAL THROUGH

Acquisition Finance

in 20 jurisdictions worldwide

Contributing editors: Marisa Stavenas, Alexandra Kaplan and Ryan Bekkerus

2014



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Getting the Deal Through is delighted to publish the fully revised and updated second edition of *Acquisition Finance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and clients.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 20 jurisdictions featured. New jurisdictions this year include Austria, France and Italy.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors, Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas of Simpson Thacher & Bartlett LLP for their continued assistance with this volume.

Getting the Deal Through

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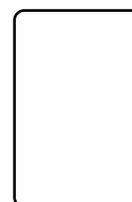
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Dominican Republic

Esperanza Cabral, Johanna Soto, Laura Piantini and Amelia Taveras

OMG

General structuring of financing

- 1** What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Transactions are generally governed by Dominican law. However, cross-border transactions agreements are usually ruled by New York State law.

On the other hand, judgments from foreign jurisdictions may only be executed in the Dominican territory after obtaining a proper authorisation. This authorisation takes the following form:

- An exequatur: which is a decision from a court of competent jurisdiction that authorises the execution in the Dominican Republic of a foreign judgment containing any covenants. The exequatur is rendered after a previous analysis of the merits and technicalities of the decision.
- A homologation proceeding: which is a procedure followed by a decision from a court of competent jurisdiction that validates a judgment containing any declaration of rights, without an analysis of the merits of such decision.

Arbitral awards must also follow a homologation procedure in order to be executed in the Dominican Republic. The Dominican Republic is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (the New York Convention). The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.

- 2** Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

There are some restrictions in regulated industries such as insurance. For example, only entities incorporated under Dominican Law may operate as an insurance company. In addition, at least 51 per cent of the capital stock (including control decisions) of an insurance company must be owned by Dominicans (registered shares); in case of Dominican entities owning an insurance company, at least 51 per cent of its capital stock must also be owned by Dominicans. This provision does not apply to the third-level beneficial owner of a Dominican entity, since a foreign entity could be the owner of the second Dominican entity.

There is also a limitation of foreign investment in the following industries:

- disposal of toxic or radioactive material not produced in the Dominican Republic;
- activities affecting public health and the country's environmental equilibrium, according to local provisions; and
- the production of material and equipment directly related to national defence and security, unless express authorisation is given by the Executive Power.

Dominican law establishes no restrictions on cross-border lending. However, country-risk indicators are considered by the regulator for the evaluation of the solvency of the debtor (determination of capacity for repayment of debts). The evaluation of country risk will only apply to debtors domiciled abroad or, if domiciled in the Dominican Republic, where more than 50 per cent of his or her business operation is concentrated in a country other than the Dominican Republic.

Likewise, there is no restriction on lending provided from foreign institutions to a local individual or entity. However, all payment commitments in foreign currencies shall be registered before the Dominican Central Bank for statistical purposes, but not as a prior requirement for repayment in a foreign currency.

- 3** What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Senior debt, subordinated debt and bonds are the typical debt components of acquisition finance in our jurisdiction.

In most cases the acquisition financing includes only senior debt. Lenders secure their debt by collateral on which the lender puts in place a first lien.

- 4** Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

Even though the Dominican Republic has had a market trade regulation since 2000, the stock exchange market has not been developed and the capital market is limited to debt securities. Therefore, there are no listed companies in the Dominican Republic.

- 5** Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

Lenders and borrowers contractually agree on restrictions for the use of proceeds. Proceeds shall be used for the purpose of the acquisition and in some cases for the payment of company debt and the payment of dividends to shareholders as part of such acquisition.

- 6** What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

The Monetary Board shall authorise financial institutions to provide financing. This authorisation may only be denied due to legal reasons and not because of a market opportunity. Financial institutions are also subject to continuous supervision by the Dominican Superintendency of Banks.

- 7** Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

Borrowers are not liable for any withholding tax, unless interest is paid to an individual or entity abroad (without residency or domicile in the Dominican Republic). In such cases, debtors shall withhold 10 per cent over interest paid from any Dominican source and submit such payment to the Tax Administration.

- 8** Are there usury laws or other rules limiting the amount of interest that can be charged?

There is no current regulation limiting the interest to be charged by lenders when providing financing. In this regard, our financial law provides that financial operations shall be done under free market conditions. Interest rates for transactions completed in local or foreign currency will be freely determined among market agents.

- 9** What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

Borrowers shall indemnify the lenders on any and all of the following matters:

- indemnities related to environmental, tax and labour liabilities connected with borrower operations; and
- losses or expenses that lenders may sustain or incur as a consequence of the occurrence of an event of default, or in connection with the enforcement by the lenders of all rights and obligations under the credit agreements.

- 10** Can interests in debt be freely assigned among lenders?

Lenders may contractually agree on the assignment of interests in debt, generally funds lent to borrowers. According to the Dominican Civil Code, agreements among lenders regarding assignment of interests must be notified to the borrower, unless such interests are included or contained in a negotiable instrument assigned by endorsement.

- 11** Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

Law 189-11 of the Mortgage Market and Trust Law in the Dominican Republic and its Regulation 95-12 provides the legal basis for the operation of these types of entities in the Dominican Republic. Only entities incorporated under the law of the Dominican Republic with the purpose to act as trustee or collateral agent may perform as such. In addition multiple service banks, investment fund administrators, savings and credit associations and other financial intermediaries authorised for such purpose by the Monetary Board may serve as trustees or collateral agents.

- 12** May a borrower or financial sponsor conduct a debt buy-back?

There is no legal prohibition for a debtor or financial sponsor in the Dominican Republic to repurchase its own discounted debt, wholly or partially. In the event of a buy-back of a long-term debt, the face value of the bought back debt will be recorded as a reduction in the long-term debt stock, and the cash amount received by creditors will be recorded as a principal repayment. However, penalties for prepayment, if provided in the loan or credit agreement, shall be considered in cases of debt buy-back.

The latest value for debt buy-back (current US\$) in the Dominican Republic (public debt) was zero dollars as of 2011. Over the past 22 years, the value for this indicator has fluctuated between zero dollars in 1989 and US\$316,470 in 2005. (Source: World Bank, International Debt Statistics.)

- 13** Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Yes, it is permissible. However, some amendments require the agreement of a super majority or the totality of lenders participating in a syndicated agreement, especially in the case of a substitution of guarantees.

Guarantees and collateral

- 14** Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

The restrictions on the provision of a guarantee will always depend on the type of transaction, the type of guarantee to be given and the preference of the creditors over the securities. Nonetheless, in the Dominican Republic there are no express limitations on whether the guarantees are given by a related company or a foreign-registered company, except that transactions shall be developed on an arm's-length basis and after completion of corporate proceedings or authorisations in such regard. Other restrictions are set by the creditors or by the law regarding a guarantor's prior commitments.

For instance, regulations provide appropriate security to creditors by creating a guarantee registry system depending on the privilege to be registered over the assets. It consists of a preference of one creditor over another by the quality and conditions of the credit and its guarantees. The referred privilege could be interpreted as a possible restriction since an asset that has already been charged may not guarantee the outstanding debt. Under Dominican law, you can register a lien or encumbrance over any asset, though preference in foreclosure of the guarantee will be given to the beneficiary of the first charge registered, who is granted with a certificate of guarantee including the priority on the ranking. In this case, creditors tend to contemplate the pros and cons on the foreclosure procedure. Preference is given to security over assets located in the country to secure prompt payment and to confirm current status of such security.

Moreover, there are different costs implicated in the process of registration and release of securities such as registration fees and taxes. For example, regarding real property, Dominican tax laws establish a mortgage tax calculated upon the 2 per cent of the value of the property. Other fixed fees for registration may apply.

- 15** Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

So long as the operation is not structured as a tax advantage, the acquisition could be performed with the target's financial assistance. Nevertheless, there are certain rules regarding related party transactions. If target company and lender is a financial institution, this transaction would be restricted to the assistance of the equivalent of 20 per cent of the total value of the company's patrimony. If it is a corporation, restrictions would be set by the company's corporate policies. Generally, the following apply:

- the transaction will be carried out on an arm's-length basis;
- the company's board of directors will conduct a study and prepare a report on considerations and liabilities of the transaction; and
- remedies to protect company's assets and solvency will be pursued (perhaps creating a reserve).

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Security can be granted over all kinds of asset depending on the creditors' request to cover the outstanding debt. Among others, security is granted as follows:

- mortgages or privileges over real property;
- liens and charges over moveable assets: furniture, fixtures, machinery, equipment, motor vehicles, intellectual and industrial property;
- charges over securities and income from securities;
- liens or encumbrances over financial instruments: bank accounts, certificates of deposit, investments;
- pledge over merchandise or goods stored in bonded warehouses;
- pledge over imported goods (in transit);
- corporate guarantees; and
- endorsement of promissory notes, insurance policies, letters of credit and accounts receivable.

In addition, since terms for such securities are agreed in the credit agreements, debtors and guarantors can provide for a guarantee on all assets either present or future, and for a definite or indefinite term depending on the current coverage of the debt.

In the Dominican Republic, the charges are granted to secure the credit during its term. In general, guarantees will not expire while the credit remains outstanding. Therefore the charge will be fixed for such period of time.

Regarding future asset securities, even though a clause may provide for its charge, such charge is considered as a promise guarantee. To formalise the guarantee, it needs to be perfected, meaning all assets granted need to be charged as they arise and the registration proceeding needs to be completed thereafter.

17 What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Once collateral is agreed, creditors must proceed as follows to protect their interest in the security:

- Mortgages over real property: creditors must file for a petition to register their privilege over the specific property before the Registry of Deeds of the competent jurisdiction (where the property is located), with due notification of the terms of the mortgage. Once this process is completed, the creditor will be issued a guarantee certificate as evidence of the security.
- Liens and encumbrances over moveable assets: the guarantee agreement with an inventory of the charged assets must be notified to the justice of the peace (where assets are located). Once this process is completed, the creditor will receive a registration certificate as evidence of the security. For motor vehicles, in addition, creditors may notify the guarantee agreement to the tax authorities to register an opposition to transfer over such assets. Regarding intellectual property, creditors may also want to register an opposition over the IP rights to the Copyright and Trademark Offices.
- Charge over shares and securities: the required notification will depend on the proceedings established by the company's bylaws. Usually notification is given to the company through the secretary of the board of directors, who registers the pledge on the company's register of charges or share certificate book. Regarding other securities, the instrument will establish the pledge proceeding.
- Charge over book-entry securities: notification for registration of the pledge shall be made by a holder of book-entry security to its broker, and then the broker shall file the pledge with the depository.

- Liens or encumbrances over financial instruments: the guarantee agreements must be notified to the financial institution where the instruments are held.
- Endorsement of insurance policies or certificates of deposit: the terms of the guarantee need to be notified to insurance companies and financial institutions, if such proceeding is allowed and previously approved.
- Pledge over merchandise or goods stored in bonded warehouses: certificates of deposit need to be endorsed on behalf of creditors. Notification of the endorsement of the certificate of deposit shall be given to the administrator of the bonded warehouse. Such agent provides a monthly inventory of the endorsed certificates to the Ministry of Industry and Trade and Agricultural Bank of the Dominican Republic.
- Pledge over imported goods (in transit): if a guarantee has been foreclosed before a guarantor has received merchandise from a shipping port, creditors must submit evidence of ownership of such merchandise to customs agents at the port.

18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

As previously indicated, liens are granted to guarantee the credit during its term. So long as the credit remains outstanding, the liens and charges will remain in full force. Nevertheless, parties can agree on liberating guarantees as debt is being covered. In this case, if credit is later increased or if any default occurs, creditors may request the debtor or the guarantor the extension of the original guarantee to secure the aggregate amount. Therefore, a continuation statement or amendment to the guarantee agreement is signed. Notwithstanding, in this last case, to perfect the security, the assets need to be charged again and the registration proceeding completed before competent authorities (if assets have already been liberated).

In the case of securities consisting of inventory and a promise of a guarantee for future assets, creditors may request a periodic update of debtors or guarantors' assets (eg, a contractual obligation to present quarterly inventories of current assets). These reports are registered before competent authorities to perfect the guarantees through the proceedings explained above.

19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

Under Dominican law, it is not mandatory to obtain consent of a works council to provide guarantees. Nonetheless, the laws do establish the possibility of creating an employee's union or internal council in a company, under such company's consent, to protect employee's rights (payment of salaries, bonuses and other compensation). Therefore it would be relative whether the approval of such council is necessary since employees may negotiate (to guarantee the payment of their benefits) that their consent is mandatory to dispose of or grant security over any company's asset. This is very rare.

20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

The Mortgage Market and Trusts Law introduces a collateral agent with an obligation to act on behalf of the creditors and represent them in any matter concerning and relating to the creation, perfection and foreclosure of the collateral that secures the repayment of a debt. The collateral agent will have the power to execute any actions and documents reasonably necessary to carry out an injunction, such as:

- obtain corporate authorisations for the execution of security documents;
- protect and defend collateral against actions of other creditors or third parties;

- oversee the preservation of the collateral in a diligent manner and keep it in a good state;
- maintain the collateral separate from assets of its own patrimony and those of its other businesses;
- inform the creditors of any fact of an economic, legal or administrative nature that may have an impact on the normal development of the obligations assumed by the agent; and
- comply with the instructions that may be issued from time to time by the creditors.

21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

As established, creditors will be provided with certain privilege over their guarantees depending on the terms of the security. Creditors will receive protection depending on the ranking the security was registered in before the competent authorities. As an additional remedy, the Mortgage Market and Trusts Law creates a specific insurance in favour of financial institutions to secure debtors' default on repayment. In case of securities, the depository of book-entry securities provides protection to such assets until a pledge has been released or a judgment is received in this regard.

On the other hand, a Mercantile Restructuring Bill will introduce a protection for creditors regarding guarantees involved in this process, in case there is a risk of partial or total loss. This protection mainly consists of additional remedies regarding: an increase or substitution of the guarantee, repayment arrangements during a restructuring period, and other remedies to compensate creditors' potential loss.

22 Describe the fraudulent transfer laws in your jurisdiction.

Fraud can be remedied by a claim of nullity of the act that provides for the deprivation of rights followed by a claim to seek punitive damages.

The Mercantile Restructuring Bill provides remedies for creditors in case of a fraudulent transfer that affects their guarantee. Such creditor, individually or through a creditors' committee, may file for the annulment of debtors' actions or executed agreements that affect collateral. This remedy also applies retroactively during the two years preceding the restructuring process. If a fraudulent transfer of any kind specified in this Bill is decided by a court, it can also be sanctioned with imprisonment for up to two years and other punitive damages may be awarded against anyone responsible of fraud. Other formalities required for this process are identified below.

Debt commitment letters and acquisition agreements

23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

The main documents generally used in the Dominican Republic for acquisition financing are:

- an initial commitment letter, which usually includes a term sheet or an indicative summary of the basis upon which the lender is prepared to provide a credit facility for the acquisition;
- a loan agreement;
- an intercreditor agreement, if there is more than one lender; and
- the security agreements as may be required by the lender, which may consist of pledge of shares agreements, mortgage agreements, liens or encumbrances over moveable assets agreements, corporate guarantees, letters of credit and promissory notes, among others.

For large-scale acquisitions, it is common for the buyer to resort to long-term financing with international or local lenders. Occasionally, the seller may also give the buyer a short-term facility for the payment of the acquisition price, with due guarantees.

The loan and security agreements are usually executed on or before the consummation of the acquisition or on or before the funding date, in accordance with the acquisition documentation.

24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

The general rule, especially in minor and medium-scale acquisitions, is the use of outright obligations, under which, for example, the lenders oblige themselves to provide the funds, once the conditions precedent are met.

Notwithstanding the above, due to regulatory restraints related to credit risk, local lenders are unable to finance large sums of money. Consequently, for acquisitions involving the need for substantial funding, lenders in the Dominican Republic may need to resort to a loan syndication, which usually consists of pre-marketed (club loan) or best-efforts syndication.

Generally, best-efforts obligations are admitted by parties when there is a clear recognition that the fulfilment of an obligation can escape from the control of the obligated party due to external causes, either because of acts of God, acts of state or changes in market behaviour, among others.

25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

The customary conditions precedent are as follows:

- the consummation of the acquisition on or before the funding date and satisfaction or waiver of all conditions precedent to the consummation of the acquisition;
- execution and delivery of credit agreements, as well as the perfection of liens and charges on the collateral;
- the non-existence of any material adverse change;
- the non-existence of an event of default;
- completion to satisfaction of required due diligence;
- obtaining required authorisations by lender;
- payment of fees, expenses and amounts payable to the lender;
- receipt of customary legal opinions, corporate documents and required certifications;
- obtaining all third-party and government authorisations, permits and licences that are necessary or advisable;
- appointment of auditors acceptable to the lender;
- appropriate insurance cover; and
- other customary closing conditions including written notice of borrowing and accuracy of representations and warranties.

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Flex provisions can be seen in large-scale acquisitions financing; notwithstanding, the same are subject to previous approval from the Consumers Right Council and the Superintendency of Banks, as abusive clauses and practices are prohibited by law. When flex provisions are admitted, they usually relate to financial terms, which will enable the arranger to change pricing, yield, amount of commitment and other financial conditions to obtain syndication, in the event that the initial financial terms are not permitted by the market.

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

No, this kind of structure is not typically used in the Dominican Republic. Even though there have been significant advances in the public securities market in the Dominican Republic, the market is still emerging. Thus, most companies have no interest in submitting to local regulations and procedures for the issuance of securities neither as a sort of financing nor as a guarantee. Promissory notes, corporate guarantees, letters of credit, pledge of shares, pledge of account receivables and other traditional guarantees are more commonly used to secure bridge loans.

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

Basically, the lender pursues protection and due guarantees from any liabilities affecting the company, as well as its operation or the assets to be acquired, including but not limited to labour, tax, title ownership, civil liabilities, obligations with third parties, fulfilment with any environmental regulation, permits and authorisations required for operation, among others.

Additionally, if the borrower enjoys a concession right granted by the government or any other public or private party, another protection afforded to lenders is the execution of direct agreements between the lenders and the grantor to enable the lender to assume the borrower's rights under the concession. If for instance the grantor decides to anticipate the termination of the concession and is required to pay compensation to the borrower, by means of the direct agreement the grantor would pay such compensation directly to the lender.

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

Acquisition agreements are usually confidential between the contracting parties, and executed under private signature; therefore, the acting notary merely verifies and certifies the signature of the parties, but is not required to register the main documents under public record.

Nevertheless, there are certain agreements that are drafted and executed for registration purposes to comply with local regulations, and that are usually included as exhibits of the main acquisition agreement. Such is the case of the transfer declaration of shares, which is executed and filed in the Mercantile Registry as evidence of the change of ownership in the shares of the company. Moreover, if the acquisition is structured as a sale of assets, it will be required to file in the corresponding governmental office a separate sale agreement for those assets subject to registration, as in the case of real property, vehicles, industrial property, grants and concessions, among others.

If for instance the loan agreement involves foreign currency commitments, the same is required to be filed before the Central Bank for statistical purposes. As for the security agreements, most of them are required to be filed with the corresponding governmental office. Such is the case of the mortgage agreement and the pledge of moveable assets that are required to be filed with the Registry of Deeds and the corresponding justice of the peace, respectively. In addition, if there is collateral over a concession right or an intangible right involving the government, certain official procedures must be followed, such as prior notification and authorisation.

Enforcement of claims and insolvency

30 What restrictions are there on the ability of lenders to enforce against collateral?

Dominican law establishes that the debtor's assets are the common pledge of all creditors, distributing the value among them pro rata, unless there are legitimate grounds for preferences. In this sense the only restriction for the enforcement against a duly registered collateral would be the preference periods described below.

31 Discuss any preference periods in which secured claims could be avoidable.

According to the Dominican Civil Code the legitimate causes of preference are privileges and mortgages. The law grants general privileges to tax, labour and child support credits over any other kind of credit. These privileges do not require any registration formalities and can be executed over any moveable asset or real estate property of the creditor. Two or more privileged creditors in the same range will collect their credit pro rata. The second cause of preferences is mortgages. However, the right of priority in the collection will be determined by the time of registration at the Registry of Deeds. The residual amount after the execution of the above-mentioned preferred credits would be available to unsecured creditors.

32 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

There are no legal dispositions concerning DIP financing in Dominican Republic or the creation of a special privilege for this type of creditors. However, under the current regime during insolvency proceedings, bankruptcy must be declared and as such the debtor loses the management of the company or its assets, since it is granted to up to three administrators designated in common agreement by the creditors. The main objective of said administrators will be to liquidate the debtor's assets in order to respond to the creditors but not to guarantee the continuance of the business unless is required to protect the creditor's interests.

Notwithstanding the aforementioned, the Mercantile Restructuring Bill if enacted will allow the administrator of the restructuring entity to obtain new credit required for the continuation of the business. However, it does not grant a special privilege for new creditors over previous creditors.

33 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

Dominican law does not contemplate a reorganisation process in cases of insolvency. Instead, insolvency cases will lead to a bankruptcy process according to the provisions of the Commercial Code, the final objective of which will be the liquidation of debtor's assets to repay creditors.

The bankruptcy process is comprised of two stages:

- a conciliatory process before the Ministry of Industry and Commerce (acting through the Chamber of Commerce); and
- judicial liquidation, before the commercial courts.

Upon the commencement of both stages, a general stay is enforceable against the creditors. The identified creditors will have the right to agree upon the terms of the collection of their credits, but always respecting the rank of privileged creditors.

The Mercantile Restructuring Bill also provides for a general stay against creditors once the debtor has started the reorganisation process.

34 In the course of an insolvency, can previous payments to lenders be clawed back by a court or other authority? What are the rules for such clawbacks and what period is covered?

According to the Dominican Commercial Code the following payments and disposition acts will be declared void and without effect by a competent court following the ordinary commercial procedure:

- payments and charges of assets made by the debtor after the date identified by the court as the date of cessation of payments, or within the 10 days that preceded this period; and
- payments and any other onerous acts made by the debtor for the concept of overdue debt in the period comprised between the declaration of cessation of payments and the judgment declaring bankruptcy (when different), if those who have received the payment had knowledge about the declaration of cessation of payments.

According to the Mercantile Restructuring Bill, all payments or acts of disposition made by the debtor up to 24 months preceding the declaration of reorganisation that may adversely affect the creditor's principal will be null and void.

35 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

During the bankruptcy process, a court identifies and validates creditors through a public procedure. Decisions regarding the payment of credits will be taken with a positive vote of 75 per cent of the identified creditors. A court shall approve this agreement. Preferred creditors (due to privileges and mortgages) will have priority in their collection. The unsecured creditors will collect pro rata from the residual amount after the execution of the preferred creditors.

Under the Mercantile Restructuring Bill the reorganisation plan must be approved by at least 70 per cent of the number of creditors, and at least 51 per cent of the total amount of credits. The distribution of payments shall be made recognising the extent and priority corresponding to each credit.

36 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

There are no limitations for agreements addressing lien priorities. If the agreement affects mortgages and pledges, each creditor's rights will be ranked in accordance to the date of registry and the terms of the agreement. Please note that these agreements cannot affect creditors with legal privileges (tax and labour credits) and that the collection of the credits will be against the residual amount after the execution of the first registered credit.

37 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

OID creditors will have the right to participate in the creditors' mass during a bankruptcy process. In principle, the credit shall be recognised by its face value. However, since the court may determine the value of credits at the moment of the validation of creditors, variations can be expected. If the instrument holder disputes the determination of the credit, it shall complete the process established by commercial provisions. The collection will proceed in the applicable rank according to the terms of the instrument issuance. If no preference is available, the collection will be made together with unsecured creditors on a pro rata basis.

38 Discuss potential liabilities for a secured creditor that enforces against collateral.

Under Dominican legislation all liabilities related to proprietorship of the executed asset (including environmental, civil or penal liabilities) will follow the new owner. However, the main liabilities derived from collateral enforcement are tax related. Thus, execution over registered assets (real estate and vehicles) will require the payment of a property transfer tax (variable according to the nature of the asset) by the secured creditor. Additionally if the executed asset's value exceeds the amount of the original credit, interest and execution expenses, it may generate a capital gain to the creditor. According to Dominican legislation, this benefit is subject to tax at a rate of 29 per cent of the gain.

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X P K C **O M G** B X P Q K O E B
R L V Q L T R D L N S T R A T E G I C
E F H N S I E K A N S K I L L S

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