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Contributing editor

Joseph Philip Forte
DLA Piper LLP (US)

Publisher

Gideon Robertson

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Lydia Gerges

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Senior subeditor

Caroline Rawson

Subeditor

Anna Andreoli

Director

Callum Campbell

Managing director

Richard Davey

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Dominican Republic

Juan Alcalde and Vilma Santana

OMG

GENERAL

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 a written 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 Registration and recording system

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

The Dominican real estate property system is based on the Torrens title system, which is a system for registration of the title granting ownership of the land in a public land registry. This public registry registers the rights over an already registered piece of land; and grants

enforceability of these rights over the land and the legal status of the land, specifically regarding the existence of liens or encumbrances. On the other hand, some real estate in the Dominican Republic remains unregistered. The ownership over this unregistered land can be transferred by a deed, which is drafted in accordance with the terms and conditions set in the Civil Code. In order to make this deed effective against third parties, it is necessary to transcribe said deed, in accordance with Law No. 2914 of Registry and Conservancy of Mortgages, in a public mortgage registry. Nevertheless, in order to secure title and priority, it is highly recommended that the owners of the unregistered land change the status of the land to move to the Torrens system (registration) by going through a legal and technical process where the land is identified and individualised, according to the provisions of the Real Estate Law No. 108-05.

Failure to register the ownership of the real property at a land registry does not make the transaction void, but as addressed before, in order to be effective against third parties, it needs to be registered, and furthermore, this registration guarantees title, ownership and priority.

Under the Dominican legal system, there is no leasehold or security interest in real property.

3 Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

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

- a real estate purchase sale contract duly notarised by a notary public;
- an 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 otherwise agreed;
- evidence from the Dominican tax authorities that the seller is up to date with the payment of taxes related to the property;
- a copy of the identity card or passport of the parties or its representatives, and a 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 between the local land registries of each province of the country; nevertheless, every land registrar has discretionary powers to request any additional document that it may consider applicable to proceed with the conveyance.

The developers of mixed-use real estate developments can benefit from a special scheme of tax exemption established by Law 158-01. This special regime grants the developer of the project an exemption of 100 per cent of the transfer tax of the property to be developed.

4 Land records

What are the requirements for non-resident entities and individuals to own real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There are no special requirements or restrictions for non-resident entities and individuals to own real estate 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.

The foregoing applies equally to foreign tenants.

5 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

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

6 Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Under Dominican law there are two main types of civil liabilities: contractual and extra-contractual (tort liability). There is no standard of strict liability directly connected with real estate; although the applicable Environmental Law No. 64-00 does provide strict liability in connection with activities that produce environmental harm.

Under statutory law (the Civil Code), the owner of the property must guarantee the purchaser or tenant against hidden defects and against eviction.

Regarding extra-contractual liabilities, the Dominican Civil Code establishes a legal presumption of liability against the owner of a building for damage caused to the building when such damage has occurred due to the owner's negligence or any construction omission or defect. For the owner to avoid the presumption of liability in connection with any civil wrong or tort that occurred in its property when it is under a lease, it is customary to address in lease contracts that tenants will be liable for any loss, costs, attorney's fees, damages and judgments arising out of the death, injury, loss or damage caused to any person or property of any person or entity that occurs anywhere in an apartment or commercial space as a consequence of acts or omissions of the tenant.

The parties claiming damages shall have to prove negligence or wilful misconduct by the landowner or the tenant, as applicable; the damage; and the relation of cause and effect between the negligence or wilful misconduct and the damage, in order to obtain an award of damages.

Regarding the lenders, these liabilities do not affect them; however, if the granted security is an antichresis, as addressed in question 32. Since the lender is in possession of the real estate, he or she shall be liable for the damage caused to third parties. In this case, the party claiming damages must prove the elements described above.

In order to avoid incurring, for any environmental offence, administrative fines, or limitation or restriction of activities causing potential environmental damage, owners and tenants must comply with the applicable regulation set forth in Environmental Law No. 64-00. This Law recognises the 'polluter pays' principle and provides a strict liability in this regard. The scope of this liability entails the payment of the damage caused to the environment and the restoration of the environment to its previous state.

7 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 damage, including damage caused by acts of nature and third-party damages claims.

Regarding environmental problems, the person in charge of the activity, infrastructure or project that requires environmental permits or licences under Environmental Law No. 64-00 must pay a performance bond equivalent to 10 per cent of the overall costs of the infrastructure or the investment. This performance bond is required to fulfil the programme of environmental management established by Law No. 64-00.

8 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? Are contractual choice of law provisions enforceable?

Dominican law allows the contracting parties to choose the law that will rule the contract, therefore contractual choice of law provision will be enforceable; 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 foreign nationals, will be governed by Dominican law.

9 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 single-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 must identify the parties involved.

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 foreign national 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 on judicial assistance to which the Dominican Republic is a party.

10 Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, leasehold and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The treatment between commercial and residential properties is the same in our jurisdiction.

11 Planning

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Our jurisdiction controls, limits and protects development, construction and use of real estate via statutory law and certain decisions and orders issued by the corresponding city hall; these legal restrictions are usually related to the use, maximum number of bedrooms allowed per square metre and location of the construction to be erected in the real estate property. In fact, the city hall has jurisdiction to determine which type of construction can be built on the real estate: residential, commercial, institutional or industrial and a specific permit (a 'use of land permit') needs to be obtained by any developer before the corresponding city hall as an initial step to start the construction process and to be able to apply for the environmental and construction licences. There are certain urban zoning regimes, especially in the capital city of the country but there is not a general one that affects all the real estate of the country.

The Ministry of Tourism is competent to control and limit development, if it has touristic components.

There are also environmental restrictions depending on the location and the use of the real estate property, especially if the property is located within the boundaries of a national park.

12 Compulsory purchase

Does your jurisdiction have a legal regime for compulsory purchase of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

There is a legal regime for the compulsory purchase of real estate that is addressed in Law No. 344, which provides a special procedure for the attempted appropriation by the government, dated as

of 31 July 1943, modified by Real Estate Law No. 108-05; and in Law No. 13-07, which creates the Tax and Administrative Court. These Laws provide the legal framework and the specific procedure to compensate owners at a fair price for a compulsory appropriation and the competent court.

Regarding owners' compensation, the Constitution establishes that no person shall be deprived of his or her property, except for reasons of public utility or social interest, upon payment of the fair value determined by agreement between the parties or a competent court in accordance with the law. The competing interests of the government and the owner are valued by each of the parties through the corresponding appraisals that evidence the parties' alleged fair price for the appropriation of the real estate. The court reserves the right to determine the fair value upon their discretionary powers based on the appraisals. Nevertheless, this compensation is only provided for the owner; there is no statutory provision or regulation that provides the tenants and or lenders with any compensation for a compulsory purchase. This does not prevent the owner and the lender to agree contractually on the manner to deal with the event an appropriation.

Real Estate Law No. 108-05 provides that when real estate is expropriated by the government, the corresponding land registry will not proceed to register the transfer of any rights in such property until it is demonstrated that the registered right holder has received the entire fair price of such expropriation from the state.

There are no exceptions to the payment of compensation for such expropriation; however, if the government declares a state of emergency or defence, the payment of the compensation may not be prior to the appropriation.

13 Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

According to the Constitution, only the property of individuals or corporations, obtained through illegal acts committed against public property, as well as those used or derived from illicit trafficking activities of narcotic drugs and psychotropic substances or relating to organised crime or any other offence under criminal law may be subject to confiscation or seizure by the government without compensation. A final judgment by the corresponding court is needed for the government to proceed with the forfeiture.

INVESTMENT VEHICLES

14 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 the Dominican Republic 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 the legal system; therefore, all for-profit business associations, regardless of their form, are subject to tax.

The vehicles and entities that best protect shareholders from liability 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 enacted in 2011 and provides the possibility of

investing via a trust 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 taxes must be paid.

15 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.

With the enactment of Law No. 189-11 for the Development of the Mortgage Market and the Trust, investment via the *fideicomiso* is expected to be widely used, especially under the special vehicle of the investment and real estate development *fideicomiso*.

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

- it is easier to handle offshore transactions;
- some exemptions apply (referred to in question 16); and
- there is less fiscal cost in the case of capitalisation.

16 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 (by-laws, 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.

For *fideicomisos*, the trustee shall comply with certain requirements, such as being incorporated under Dominican law with the exclusive objective of carrying out fiduciary activities. Only these entities as well as financial institutions, investment funds and securities agencies duly authorised by the corresponding governmental institutions can carry out fiduciary activities.

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 is subject to a 29 per cent withholding tax.

ACQUISITIONS AND LEASES

17 Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

There is just one category of legal ownership: absolute ownership. An owner has the right to enjoy, use and dispose of its property in the most absolute way, including the right to convey it to others, as long as it is not prohibited by any law or regulation. There are no leasehold or occupancy interests; nevertheless, said owner could grant to third parties certain rights over its property; such as the right of use; usufruct rights, habitation rights and lease of the property. Except for the habitation rights, the other rights, in order to be effective against third parties, shall be registered at the Land Registry.

Regarding benefits to, and burdens on real estate, such as rights of way, easements, air rights, access; they can be created either by a law, judicial decision or contract.

Condominium regimes are recognised in the Dominican Republic by special Law No. 5038, dated as of 21 November 1958, amended by Law No. 108-05. Cooperative ownership arrangements are not recognised.

Master leases are used but the landowner must explicitly authorise subleases. As for the space leases for the different types of properties, there are no differences in its regulation; the only thing that differs is the destination and use of the real property.

18 Pre-sale

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.

19 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 purchase 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 defects 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, especially when a large part of the payment is subject to certain conditions. As mentioned above, a seller 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 as a result of 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 litigation in progress that may affect the property. A type of indemnification clause is usually inserted in this representation.

Prorations are not applicable in Dominican 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.

20 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. 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.

21 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 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.

22 Leases and real estate security instruments

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

A lease is not subordinate to a security instrument pursuant to the provision of the lease or vice versa; however, when the lease is recorded at the land registry prior to a security instrument, such as a 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.

23 Delivery of security deposits

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

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 the Dominican Republic, 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.

24 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? Discuss the priority among the various interests in the estate.

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 often requested when international project financing is involved.

Regarding indemnity funds, the Dominican Real Estate Law No. 108-05 provides for a guaranty fund, which is the security provided for the purpose of compensating and indemnifying those who without negligence and in good faith, have been adversely affected by the implementation of said Law. However, this fund has never been implemented.

Taking into account that the Dominican Republic real estate system follows the principle of 'first in time, first in right', granting statutory priority for recorded instruments based on the date of their filing or registration, under Real Estate Law No. 108-05 the buyer can demand from the landowner the delivery of a certification of priority reserve in order to guarantee the immutability of the status of the land during the negotiations. The term of this priority reserve is 15 days.

25 Structural and environmental reviews

Is it customary to arrange an engineering or 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 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 7.

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

26 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.

27 Other agreements

What other agreements does a lawyer customarily review?

Lawyers will usually review all the agreements in connection with real estate operations. The most common are 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.

28 Closing preparations

How does a lawyer customarily prepare for a closing?

The primary objective in preparing for a closing is to obtain the documentation that meets the land registry requirements for the authorisation for conveyance of the property. However, as part of the due diligence and the preparation for 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 and the corresponding documentation evidencing that the property is up to date with the payment of the property taxes. At the same time, if the transaction entails financing, the applicable documentation will not be different 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.

The contract is usually signed and executed on the closing date. The closing and funding are usually simultaneous but may experience some delay if the funding is made by wire transfer.

Prorations are not customary in the Dominican Republic.

29 Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The signing of the contract can be done with all parties present or in counterparts, although the latter could not be recognised by the Land Registry and might demand the signature of all the parties present in the same document. If the agreement is subject to conditions precedent and the payments are made in instalments, the services of an escrow agent are customarily used. The closing does not need special formalities other than the presence of a public notary in order to notarise the signature of the involved parties (legalisation by a public officer). It does not have to be conducted at a government office.

In order to execute the conveyance of title to one party to another, the documentation mentioned in question 3 must be filed before the Land Registry that has jurisdiction over the real estate property. This filing can be done by a third party appointed by the purchaser or by the purchaser in person.

30 Contract breach

What are the remedies for breach of a contract to sell real estate?

The remedies for breach of a contract to sell real estate can vary depending on the transaction; however, the most common are the following:

- a penalty clause, which is contemplated in the Civil Code as a compensation for the loss caused as a consequence of a breach of the principal obligations under the contract. these clauses usually represent sums of money;
- the enforcement of the granted collateral, by completing the corresponding judicial process; and
- the award of damages (in order to obtain these damages a claim against the defaulting party must be filed, and the corresponding final award granted by a court must be obtained).

The contract cannot be specifically enforced by the purchaser. In case of a breach of contract, the affected party must file a claim against the defaulting party before the competent court in order to

obtain either the execution of the obligations under the contract or the award of damages; or both.

31 Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply?

The remedies available for tenants are to file a claim against the landlord before the competent court in order to demand the execution of the agreement and to obtain an award for damages.

Regarding the landlord, if there is a breach of the main obligations of the contract he or she can file a claim to obtain either the payment of the rent due plus damages; or the termination of the contract, payment of the rent due and damages, and the eviction of the tenant.

There is a customary judicial procedure in order to evict a defaulting tenant before the local courts.

A lease is ruled by both the contract and the special real estate rules contained in the Civil Code; Law No. 17-88 on Lease Deposits in the Agricultural Bank, 5 February 1988; and Decree No. 4807 on Rent Control and Eviction, 16 May 1959.

FINANCING

32 Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction.

In our jurisdiction, the customary and usual real estate security instrument is the mortgage, which shall be registered before the corresponding land registry in order to be effective against third parties and other lenders and to be enforceable. The mortgage grants the lender a lien over the registered real property and moveable assets attached to said property that is granted to secure the execution of an obligation (debt) and that is extinguished upon payment or performance according to stipulated terms.

Besides the mortgage, there is also the antichresis, where the security given consists in immoveable property or real estate. Here the creditor acquires the right to take the rent and profit of the land, and to annually credit the same to the interest of the loan, and the surplus to the principal of the debt, being bound to keep the estate in good condition and to pay the corresponding taxes. Upon default of the debtor, the creditor may prosecute the debtor before the competent courts, and obtain a judgment authorising the sale of the land. This security interest is scarcely used because the creditor is bound to keep the estate in good condition and pay taxes.

33 Form of security

What is the method of creating and perfecting a security interest in real estate?

The term 'security interest' per se does not exist; there is no property interest created by agreement to secure the performance of an obligation; what we do have is the mortgage, which grants the lender a lien over the registered real property that is granted to secure performance of the obligation (debt).

This mortgage is created in writing (in Spanish) and perfected with its filing and registration at the corresponding land registry depending on the location of the property. Upon completion of the registration process, a creditor's certification is issued in its favour. The mortgage is cancelled once the debt is paid in full or as the result of adjudication.

34 Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?

Lenders usually require third-party real estate appraisals to underwrite a loan. These appraisers do not have to have specific qualifications but must be recognised and capable professionals.

35 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 result 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. These costs are normally transferred to the borrower.

If there is a specifically notarised promissory note secured by a real estate the creditor can register a mortgage with the note in the corresponding civil registry. In the event of this, besides the above-mentioned mortgage taxes, certain fees apply to register the note; its calculation will depend on the amount secured by the note.

36 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? 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 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 protect 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.

37 Loan 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. 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 No. 6,186 of 1963 is only applicable to mortgagees that are financial institutions.

As for pledge realisations, Law No. 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.

Conventional collateral granted under Law No. 189-11 of the Development of the Mortgage Market and Trust has its own enforcement procedure, which is also an abbreviated procedure.

38 Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there any limitations on the amount or method of calculation of the deficiency?

There is no specific procedure for lenders to recover any deficiency between the outstanding loan balance and the amount recovered in the foreclosure. However, lenders may go after all the assets of the borrower and therefore appeal to the corresponding court on grounds of the deficiency of the amount recovered in the foreclosure in order to obtain a judgment granting a judicial mortgage over other real estate or seizure over moveable assets owned by the borrower.

39 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 37, 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.

The concept of mortgage in possession is prohibited by the Civil Code; a mortgagee can not take control of mortgaged land by agreement with the mortgagor (ie, upon default of the loan secured by the mortgage). In order to take control of land the foreclosure process must be completed. (See question 32 for an explanation of antichresis.)

40 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 or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents may provide for recourse to all of the assets of the borrower. Depending on the agreement among the parties, the recourse could be limited to the collateral. Furthermore, recourse to personal guarantors is common, since it is customary that these agreements provide that the obligation of the guarantor is joint and several, waiving the rights of the guarantor to demand prior

Update and trends

The Dominican government has adopted as one of its main axes of public policy for this period a plan for providing certain rights to people occupying government land for long periods of time as a result of old policies carried out by some government agencies. A Commission formed by high-ranking government officials has been put in place to address a social problem that affects more than 100,000 people, most of them located in rural areas. The goal is to review

the current status of more than 1 million rural parcels and under certain conditions to provide the farmers with the registration of their ownership over the parcel.

Finally, last November 2012 an exemption of 100 per cent of the transfer tax applicable to first purchasers of units or plots in mixed-use real estate developments previously classified under the Confortur Law was repealed by the government.

exhaustion of the assets of the debtor. Therefore, 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 assets of the borrower other 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 notarised promissory note, 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, Dominican law sets forth wage claims and pending taxes as preferred debt.

41 Cash management and reserves

Is it typical to require cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is not common to require a specific cash management system in loan agreements. On the other hand, lenders typically do take reserve accounts; from this reserve account, the lender may withdraw the money it deems necessary to meet the obligations due of the loan, mainly those relating to payment of principal, interest and accessories.

42 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.

43 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.

44 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.

45 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency 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, instead insolvency cases will lead to bankruptcy proceedings resulting in 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 Dominican 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 a 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.

Dominican Republic law on this matter continues to be 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.

46 Secured assets

What are the requirements for creation and perfection of a security interest in moveable property? 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.

47 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 or insolvency filing, has the concept been upheld?

Our financial and monetary regulations do not require that each borrower be an SPE. Neither do lenders, international or national financial institutions.

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

E L N V X P R E F C O H G E X
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

Juan Alcalde
Vilma Santana

j.alcalde@omg.com.do
v.santana@omg.com.do

Pedro Henríquez Ureña 150
Torre Diandy XIX, 10th and 11th floors
Santo Domingo 10106
Dominican Republic

Tel: +1 809 381 0505
Fax: +1 809 381 0606
www.omg.com.do

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