

Loans & Secured Financing

In 18 jurisdictions worldwide

Contributing editor
George E Zobitz



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GETTING THE
DEAL THROUGH

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Loans & Secured Financing 2016

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Dominican Republic

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OMG

Loans and secured financings

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

The primary advantages of incurring indebtedness in the form of bank loans as opposed to debt securities include the ability to reach a swift closing without any regulatory processes, the fees charged by banks are usually lower than those charged by brokers and the banks' willingness to accommodate better terms for their clients. While banks are always trying to accommodate better terms for their clients, once closing is reached, such terms tend to remain more restricted and unforgiving than those that can be found in debt securities.

On the other hand, through debt securities, issuers have the advantage of accessing money with a lower cost of funds and at a better rate. Although the process of registering securities, when required, is lengthy, issuing debt securities for long-term financing is usually better in the long run.

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

In the Dominican Republic, banks offer the traditional range of financing options to customers. Among these are:

- term loans;
- revolving credit lines and demand loans; and
- letters of credit.

These facilities can be either unsecured or secured. Typical collateral granted by debtors to banks are mortgages (over real estate), pledges (over moveable assets), cash collateral and accounts receivable.

Facilities such as bridge loans, swingline facilities and tandem loans are granted on a case-by-case basis.

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Commercial banks, savings and credit banks, savings and credit associations and credit corporations are the usual investors in bank loan financing. There is also a state bank dedicated to sector lending by providing facilities to agricultural and agroforestry endeavours. Although quite rare and in the form of mezzanine debt, investment fund management companies are also participating in bank loan financing.

As a result of the restrictions on investments placed on banks by the Dominican Monetary and Financial Law, there is no major overlap between the investors in bank loan financing and those that participate in debt securities financing.

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

Savings and credit associations and credit corporations usually offer smaller facilities, with reduced interest rates and fees when compared to commercial banks and savings and credit banks.

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

In the Dominican Republic, bank loan facilities are typically used in the early stages of project finance, in between the negotiation of large facilities and, less commonly, for debt security financing.

When compared to a typical bank loan facility, bridge financing usually has higher interest rates, a short repayment term (maximum term of one year), and fewer conditions precedent to ensure a fast drawdown of the funds. In the process of negotiating large facilities, it is quite common for banks to grant bridge facilities to finance the short-term working capital needs of their clients.

6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

When administering bank loan facilities, is it common for administrative agents to serve as a liaison between the debtor and the creditors. Administrative agents monitor the debtor's compliance with the terms of the contract, lend their domicile to serve documents on creditors, coordinate the engagement of experts (accountants, attorneys, etc) acceptable to the creditors, as well coordinating communications between the debtor and the creditors and among the creditors themselves.

Depending on the terms of the contract, collateral agents register the collateral to their name and carry on the foreclosure of said collateral, if necessary. They are also in charge of performing the valuation of the collateral in order to determine whether more collateral is needed. Additionally, if the collateral is allocated to the collateral agent following a foreclosure procedure, said agent is responsible for paying income tax for the exploitation or further sale of the collateral and property taxes, if applicable.

In the Dominican Republic, both administrative agents and collateral agents require that creditors hold them free from any liability arising from the performance of their faculties. For collateral agents, Dominican law provides for the reimbursement by the creditors of any taxes and costs that such agents might incur in the performance of their duties.

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

The arranger of syndicated bank loan facilities is usually in charge of:

- receiving the payments made by the debtor and distributing such payments to the other creditors;
- supervising the debtors' compliance with the terms and covenants of the loan documentation;
- acting as collateral agent for all the creditors;
- receiving from the debtors' all communications and notifications addressed to the other creditors and vice versa; and
- pursuing any legal actions in coordination with the rest of the creditors.

Although fees and commissions vary from arranger to arranger, it is customary for them to charge a syndication fee of 0.2 per cent of the total loaned amount. Investors in syndicated loans typically charge 0.25 per cent of their pro rata participation in the loaned amount.

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

In the Dominican Republic, these kinds of transactions are usually governed by the laws of a recognised financial centre such as the state of New York or England. This is because the legal precedents in the jurisdiction of most financial centres are considered more settled than in other countries. Dominican legislation does not establish any legal impediment to secure foreign loan agreements with assets located in the Dominican Republic. Nevertheless, and as long as the collateral is located in the Dominican Republic, Dominican law usually governs the collateral documentation.

Regulation

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

The availability of bank loans and related facilities is affected by the liquidity and solvency requirements established in Law No. 183-02 and the regulation regarding the prudential norms on capital adequacy. The liquidity requirements take the form of *encaje legal*, a mandatory reserve that must be held permanently in the Central Bank of the Dominican Republic.

According to the regulation regarding the prudential norms on capital adequacy, every financial entity in the Dominican banking system must have a capital requirement of 10 per cent of its assets, including their respective adjustments for credit risk, foreign exchange risk and interest rate risk. Our regulation describes capital requirement as the sum of tier 1 capital and tier 2 capital.

Tier 1 capital is defined as the aggregate of outstanding equity, the legal reserve, non-distributable profits, mandatory cash reserves, irrevocable voluntary cash reserves and share premiums. Tier 2 capital is the aggregate amount of other cash reserves, risk-based provisions, convertible debt, subordinated debt, and the net value after asset revaluations.

Additionally, financial institutions must maintain a solvency coefficient of no less than 10 per cent. This solvency coefficient is calculated by dividing the capital requirement by the sum of their credit risk-weighted assets and contingent operations, interest rate risk and foreign exchange risk.

10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

Public company debtors have to disclose their bank loans to investors when making their financial statements available. Additionally, events of default on such loans that materially affect such public debtor must be disclosed to the Securities Superintendency and investors, as per the disclosure of relevant facts rule of our securities regulation.

11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

Although there is no specific legislation that regulates the use of bank loan proceeds, it is understood that such proceeds must be used to fund licit activities. If a debtor is found guilty of corruption, money laundering or terrorism, the authorities may investigate the origin of the funds and prosecute investors that not have followed the appropriate know your client rules and guidelines and due diligence. Depending on whether or not investors knowingly finance such activities they might be subject to fines, the loss of their banking licence and the prosecution of their officers, directors or shareholders. Investors typically try to mitigate this risk by following proper due diligence and by including limitation of liability and hold harmless clauses in their contracts. It is important to note that the Dominican financial authorities adhere to international standards and conventions on their regulations, including:

- the resolutions of the Basel Committee on Banking Supervision;
- the FAFT Recommendations; and
- the anti-money laundering and anti-terrorism resolutions of the UN and OAS.

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Although there are no regulations that limit an investor's ability to grant credit to debtors based on their jurisdiction, most investors have internal policies and guidelines to decline credit based on their prospective debtor's place of incorporation or place of doing business. Most of those policies depend on how favourable such jurisdiction's legal framework is in terms of protecting investors' interests in the event of default.

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

Other than the investor's internal policies, there are no laws, regulations, rules or guidelines that directly limit an investor's ability to extend a bank loan based on the debtor's leverage profile. Nevertheless, the Dominican Republic has regulations that compel financial entities to make certain provisions, depending on the debtor's rating.

14 Do regulations limit the rate of interest that can be charged on bank loans?

There are no regulations that limit the interest rate on bank loans.

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

Of all the banking institutions described in the Dominican Monetary and Financial Law, only commercial banks are allowed to lend in US dollars.

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

Not relevant.

Security interests and guarantees

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

Other than banks and other investors' internal policies, there are no limitations on who can provide support for bank loan financings. Under the Dominican legal framework, any member of a group of companies can provide collateral whether the guarantee is over real estate (ie, mortgage), on moveable property (ie, chattel pledge) or whether it is a personal guarantee.

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

Not relevant.

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

Under Dominican law, any asset can be pledged to secure bank loan financings. It is quite common for debtors to grant security interests over real estate, moveable property, rights (receivables, insurance policies and other contracts) and securities (stocks, bonds, etc).

20 Describe the method of creating or attaching a security interest on the main categories of assets.

Security interests over real estate (ie, mortgage) are subject to local registration at the corresponding Title Registry Office. Security interests over moveable property in the form of non-possessory pledges (pledges without relinquishing possession) are registered at the Peace Court (Small Claims Court). Although not required by local law, the documentation supporting ordinary pledges is usually registered at the Civil Registry Office.

A pledge over securities in certificate form is pledged by endorsing and delivering its certificate to the creditor. The pledge over securities in dematerialised form must be notified to the issuer and must be registered at the corresponding depository company.

The pledge over rights (receivables, insurance policies and other contracts) must be agreed to in writing and notified to the debtor.

21 What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

The steps necessary to perfect a security interest are dependent on the asset that will serve as security. Failure to perfect the security interest will effectively turn the creditor into an unsecured lender and without any collection priority upon non-fulfilment or insolvency of the debtor.

For mortgages

Mortgages over real estate must be registered at the Title Registry Office. The mortgage document must be in Spanish and duly notarised. Subsequently, the Registrar of Titles will file the mortgage agreement in a complementary registry to the Certificate of Title and issue a registration certificate to creditor.

In order to register a mortgage over real estate, its owner must be current with its property tax.

For non-possessory pledges

A non-possessory pledge over moveable assets must be registered at the Court of Peace of the domicile of the debtor. This document must be in Spanish and duly notarised. Subsequently, the Secretary of the Justice of Peace will enrol the debtor in a special book and will record the inscription on the back of the contract, which will then be returned to the creditor within five days of the request for registration. Once this process is completed, the creditor will receive a registration certificate of their security.

For other types of security interest, see question 20.

22 Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Although not expressly considered under Dominican law, it is accepted by our courts that security interests can indeed include future-acquired assets and can secure future-incurred obligations.

23 Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Most bank loan financing contracts in the Dominican Republic include a provision stating that the collateral provided shall be maintained as such up until the principal of the loan is repaid to the creditors. The authorities usually reinforce this provision by always requesting the debtor to obtain a discharge or release letter from the creditor in order to release the liens.

24 Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

There is no automatic release of security interests when the debtor sells a pledged asset. For assets that are subject to registration (real estate, vehicles, vessels), the security interest will always follow the asset until the creditors release it. For collateral consisting in rotating inventories, the debtor will be compelled to either replace the unit sold or make a pro rata principal payment to the creditors.

25 What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

Guarantors can argue that the non-fulfilment of their obligations is based on the creditors' breach of contract or that creditors must first seize and sell the debtor's assets before trying to enforce the security interest against the guarantor. Any defences are usually waived under the financing document.

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

In the Dominican Republic, parallel debt agreements are very uncommon. Where a secured bank loan is contracted without a collateral agent, the registration of the collateral would be in the name of the creditors. Should a creditor assign its portion of the bank loan to a third party, it will also need to assign its portion of the collateral.

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

The most common method for enforcing security interests is the seizure of the asset for its subsequent sale.

For non-possessory pledges in bank loans

The seizure proceeding of a pledged asset is set forth in Law No. 6186. Within 90 days following the expiration of a credit or loan, without payment of the amount due, the lender or lessor may request the corresponding justice of peace to initiate a seizure procedure on the collateral. Once the sale request is filed, the justice of the peace shall order the debtor to deliver the objects to the corresponding location. Such order will be delivered by bailiff's notice to the debtor at its domicile.

If the debtor does not deliver the goods within the indicated period, a bailiff appointed by the justice of peace will seize them. All expenses of said process shall be charged to the proceeds of the sale. The justice of peace shall appoint a custodian who will be responsible for holding the goods until the day of the sale.

A notice of the public auction for the sale of the goods will be placed for three consecutive days at the Court of Peace as well as at other locations at the discretion of the justice of peace. The public auction date shall be notified to the debtor by a bailiff's notice.

For mortgages in bank loans

Law No. 89-11 establishes an abbreviated foreclosure proceeding for mortgages granted to secure a bank loan. Upon default by the debtor and through a bailiff's notice, the creditor shall grant the debtor a 15-day period to normalise its payments or be subject to the sale of the real estate in a public auction.

Within five days of the debtor failing to pay within the period indicated in the notice, the creditor shall register said notice at the corresponding Title Registry Office, and within 10 days of the aforementioned registration, the creditor shall file at the court the terms of the public auction. Within 20 days of the registration of the terms, the creditor must publish a public auction notice in a national newspaper and notify it to the debtor through a bailiff's notice. The public auction hearing shall take place at least 15 days after the last bailiff's notice.

The proceeds of the auction will be delivered to the creditor after deducting the costs of the foreclosure and public auction. If no bids are made on the day of the hearing, the real estate will be adjudicated to the creditor.

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Not relevant.

Intercreditor matters

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

Aside from intercreditor agreements in syndicated loans and the creditors' agreement during a bankruptcy proceeding, it is very rare for creditors of different classes to agree to payment or lien subordination arrangements among themselves.

If such agreements are in place during the course of a bankruptcy proceeding, the court might not set them aside as long as such agreements do not adversely affect other creditors.

Update and trends

Currently, the business sector and the government are discussing a new law on reorganisation and bankruptcy which will incorporate new proceedings and mechanisms to protect creditors and aid distressed companies in returning to business.

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

A typical intercreditor agreement will commonly include every creditor with respect to a syndicated facility. The administrative agent of a syndicated bank loan facility will treat every signatory creditor in accordance with the terms of the intercreditor agreement, which will usually provide for equal treatment. If a need for a vote among the creditors arises, they will have voting rights in proportion to their participation in the bank loan facility.

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

If there is no agreement between the creditors, 'junior creditors' are not stayed from enforcing remedies. In the event such junior creditors are secured, when foreclosing collateral, the proceeds of the sale of such collateral will be delivered by the court in the order in which the security interest over the collateral was registered.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

In accordance with our bankruptcy rules, creditors have the right to challenge transactions that took place within a certain time frame before and after the bankruptcy declaration by a court of law. Creditors also have the right to participate in the negotiation of the agreement between the creditors and the court-appointed receiver for the repayment of the debts. If secured creditors are party to said agreement, they will lose their security interest and become unsecured creditors.

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

Not relevant.

Loan document terms

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

In the Dominican Republic there are no standardised forms approved or recommended by any association. Nevertheless, every bank must submit

their respective loan forms for the approval of the Superintendency of Banks.

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

Our legislation allows the parties to a loan agreement to freely agree on the interest rate applicable to the loaned amount. Therefore, bank loans can be contracted with either fixed or floating interest rates. In recent years, local banks have been increasingly turning to a LIBOR reference for US dollar denominated loans.

36 What other bank loan yield determinants are commonly used?

Bank loan yield determinants such as ceilings and floors for floating interest rates and currency exchange rates (when making payments) change from case to case and are usually associated with the bargaining power of the debtor.

37 Describe any yield protection provisions typically included in the bank loan documentation.

Among the yield protection provisions that Dominican banks typically use are:

- 'change in law' clauses: with these types of clauses Dominican banks protect themselves against the increased costs that new legislation might carry. It is usually translated into an increase of the interest rate;
- prepayment limitations: most banks of the Dominican Republic include a clause in their contracts whereby the debtor will refrain from prepaying more than 10 per cent of the principal amount during the first two to five years of the loan. Should the debtor proceed with the prepayment an additional charge of 0.5 per cent to 1 per cent might be applicable; and
- review of interest rates: Dominican banks will always include an interest rate review clause. This is a catch-all clause that banks normally use to increase the interest rate for the loan. Reviews every four to six months are standard practice in the Dominican Republic.

38 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

Depending on the type of bank loan and the amount loaned, banks in the Dominican Republic will not allow additional debt that is secured on a pari passu basis with their loans. Accordion provisions are usually agreed with the same bank and in the same documentation for the original loan. Should the debtor need additional funds from another banking source, the original bank will request the debtor to subordinate the repayment of the new loan to that of the original loan.

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39 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

The following are typical financial covenants:

Reporting requirements

A typical bank loan in the Dominican Republic will provide for the debtor to deliver to the bank interim or in-house financial statements every six months and annual audited financial statements within three months of the debtor's financial year-end.

Debt service coverage ratio

Banks will also require that debtors maintain a positive debt service coverage ratio (calculated as net operating income over total debt service). This ratio is calculated each time upon the delivery of the interim or audited financial statements.

Leverage ratio

In most bank loan agreements banks require debtors to maintain a leverage ratio (defined in the majority of cases as total debt over total equity) appropriate for their industry practice. Again, this ratio is calculated each time upon the delivery of the interim or audited financial statements.

Tangible net worth

It is typical to find that creditors require their debtors to maintain a minimum tangible net worth, which represents an indication of the debtor's liquidation value. This tangible net worth is calculated as total assets minus liabilities minus intangible assets and with the delivery of the interim or audited financial statements.

40 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Typical restrictions include withholding from paying dividends for a certain amount of time, refraining from selling certain assets, seeking the bank's approval for acquiring or changing the debtor's line of business. Additionally, restrictions on converting debt to equity and on contracting further debt are also normal in these kinds of transactions.

41 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

Mandatory prepayment requirements vary from transaction to transaction and are not subject to any regulation. Typical events that may trigger a mandatory prepayment when such is in place are the declaration of dividends by the debtor, a change of control in the debtor and the sale of indispensable assets to run the business. The reinvestment of asset sales, the proceeds of insurance policies and of unforeseen liquidity events is transaction-dependent.

42 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

Among other reimbursement obligations, the debtor commonly agrees to reimburse the banking institution for:

- any loss that it might incur in the case of a voluntary prepayment of the bank loan facility;
- the costs that the banking institution might incur in defending or maintaining the collateral granted as security;
- any loss as a result of modifications to the current legislation, especially in terms of taxation; and
- any out-of-pocket expenses, including attorneys' fees, in relation to the bank loan facilities.

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Anti-Money Laundering	Enforcement of Foreign Judgments	Merger Control	Securities Litigation
Arbitration	Environment	Mergers & Acquisitions	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mining	Shipbuilding
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Banking Regulation	Franchise	Outsourcing	State Aid
Cartel Regulation	Fund Management	Patents	Structured Finance & Securitisation
Climate Regulation	Gas Regulation	Pensions & Retirement Plans	Tax Controversy
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