

GETTING THE DEAL THROUGH

Project Finance

in 34 jurisdictions worldwide

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Collateral

1 What types of collateral are available?

Real estate, operating and other licence rights or concessions, leaseholds, buildings, moveable property, contractual rights, receivables, shares, securities, onshore and offshore bank accounts, entire enterprises, after-acquired property, proceeds from investments and the sale of collateral are all available.

Subject to limited restrictions, security may be granted on real estate property (the land and/or improvements), moveable property (motor vehicles, boats, aircraft) – including proceeds from their sale – contractual rights, credits, receivables, shares, bank accounts and intangible goods.

Perfection and priority

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees or taxes payable to perfect a security interest and, if so, are there lawful techniques to minimise such fees or taxes?

Existing liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

In general terms, you may request a certification of liens and encumbrances from the authority in charge or the registration of such lien. For instance, for real estate assets, such certification may be issued by the Land Registrar's Office of the jurisdiction where the property is located; for moveable assets, the certification may be issued by the Peace Court of the jurisdiction where the assets are located (except with respect to aircraft and boats).

Foreign exchange

4 What are the restrictions, controls, fees and taxes on foreign currency exchange?

None.

| Collateral | Required documentation and formalities | Priority established | Registration charges (taxes) |
|--------------------|---|---|--|
| Real estate | Mortgage agreement, duly notarised (including evidence of authority of the signatories). Owner's duplicate of property title certificate. Receipt of payment (or evidence of exemption) of the property tax. Receipt of payment (or evidence of exemption) of mortgage registration charges. Filing is made before the Land Registrar's Office of the jurisdiction where the property is located. | By filing. | Approximately 1.35 per cent of the secured amount |
| Shares | Share pledge agreement duly notarised. Share certificates. For pledges on nominative shares, a mention must be made in the company's shares transfer book. | You may only pledge shares once. | |
| Contractual rights | Pledge agreement on contractual rights, duly notarised Agreement is to be registered before the Civil Register Office. | You may only pledge once. | |
| Moveable property | Required documentation may vary depending on the goods and whether pledge is possessory or non-possessory. A pledge agreement, duly notarised, is needed in all cases. Original registration certificate is required for aircraft, ships and vehicles. | You may only pledge moveable assets once. By filing before the corresponding peace court (lowest-ranked courts, designated by law as registers). As per motor vehicles, creditors can file a transfer opposition before the Motor Vehicle Bureau. Aircraft and ships are regulated by particular registration systems very similar to those applying to real property (ie, registration before the Department of Civil Aviation, for aircraft; and before the Mercantile Marine and the Navy for boats). | Minor fees. Less than US\$500, except for aircraft, and ships, which involve the drafting and registration of an authentic act (ie, before a notary public). |
| Receivables | Pledge agreement Original of the receivables must be surrendered to the creditor. The pledge agreement shall be registered before the civil registry. | May only be pledged once | |

Remittances

- 5** What are the restrictions, controls, fees and taxes on remittances of investment returns or loan payments to parties in other jurisdictions?

No restrictions, controls or fees apply on the remittance of investment returns or loans payments abroad. As for taxes, the general principle is that Dominican source income (that is, income derived from investments or interests located in the Dominican Republic) is subject to taxation. In that regard, interest payable to financial institutions abroad is subject to a 10 per cent withholding; interest payable to non-financial institutions is subject to a 25 per cent withholding, which is also the applicable general income tax rate.

Repatriation

- 6** Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no restrictions in terms of repatriation of earnings.

Offshore and foreign currency accounts

- 7** May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes.

Foreign investment and ownership restrictions

- 8** What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

There are no restrictions as to ownership of project companies. As for registration, the applicable requirements vary depending on the industry. For instance, registration of the company (including its shareholders and directors) is required in sectors such as financial services, telecommunications, energy and mining.

Government approvals

- 9** What government approvals are required for typical project finance transactions? What fees and other charges apply?

In general terms, no governmental approvals are required. However, in most cases notice of the transaction shall be provided to the regulator of the sector or industry involved in the transaction.

Foreign insurance

- 10** What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

None. However, under local law, assets located in the Dominican Republic shall be insured by companies located in the Dominican Republic.

Foreign employee restrictions

- 11** What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

In principle, there are no restrictions on bringing in foreign workers to work on a project. However, the Labour Code provides that the workforce of companies operating locally shall be composed at least of 80 per cent Dominican personnel.

Equipment import restrictions

- 12** What restrictions exist on the importation of project equipment?

In principle, there are no restrictions or limitations on the import of machinery and equipment or services.

Nationalisation and expropriation

- 13** What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

According to articles 8-13 of the Dominican Constitution, no one can be deprived of their property rights, but for justified cause of public utility or social interest and not before receiving payment for the property at a fair value that shall be determined by decision of a competent tribunal. Any expropriation process followed by the Dominican government must comply with this and all other constitutional provisions, including the guarantee of due process. There are no forms of incorporation or investment specially protected.

Fiscal treatment of foreign investment

- 14** What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

According to the equal treatment principle set by Law 16-95 on Foreign Investment, foreign investors are entitled to the same rights and obligations available to national investors.

Tax incentives are granted in the Dominican Republic to tourism projects located in specific areas of the country, free zone companies, projects settled in the provinces located near the border with Haiti, energy generation companies and other industries.

Under Securities Market Law No. 19-00, interest payments derived from securities traded in the public local securities market are exempted from income tax payment if payable to individual (not corporate or institutional) investors. Otherwise, dividends and all other income paid abroad by a local entity to foreign investors is subject to a 25 per cent withholding tax.

In addition, Congress frequently ratifies special agreements whereby local tax incentives have been granted for government projects in the mining, construction and energy industries.

Government authorities

- 15** What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The General Mining Office is the governing body charged with administering mining activities. Other relevant government bodies involved in mining activities and processes in general are the Mining Directorate, the Ministry of Industry and Commerce and the Ministry of the Environment and Natural Resources.

Chemical refining is regulated by the Ministry of Public Health and the Ministry of Environment and Natural Resources.

Water rights are regulated by the National Potable Water and Sewerage Institute (INAPA) and the General Directorate of Water Resources.

The energy sector is regulated by the General Electricity Law No. 125-01. Regulatory bodies are the Dominican Corporation of State Electricity Companies, the Superintendence of Electricity (and the National Energy Commission).

Ports and Construction are regulated by the Ministry of Public Works and the Port Authority.

The regulatory body for telecommunications is the Dominican Telecommunications Institute (INDOTEL).

International arbitration

- 16** How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The Dominican Republic has been a member of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards since 2001. Therefore, local courts are due to recognise arbitration agreements, as well as the mandatory referral by such courts to arbitration pursuant to the agreement, the judicial enforcement and the recognition of arbitration awards and the grounds for refusal of such recognition and enforcement.

Applicable law

- 17** Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

As a result of the principle of contractual freedom, foreign laws may be chosen as the applicable law to an agreement to the extent that such choice of law is not contrary to public policy. New York law and the laws of England are frequently chosen for finance agreements. As for matters governed by domestic law, please note that securities involving real estate assets and moveables (non-possessory liens) located in the Dominican Republic are subject to Dominican law as a matter of public policy.

Jurisdiction and waiver of immunity

- 18** Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Yes. However, foreign judgments are not enforceable in the country until a Dominican court declares that such decision is valid and enforceable in the Dominican territory and issues the corresponding exequatur.

Update and trends

There are currently a great number of project finance transactions under way in the country, mainly in the energy, mining and infrastructure sectors but their structures and security packages, which have worked so well in the last couple of years, have generally been used without many significant changes.

Bankruptcy

- 19** What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes are available to seize the assets of a business outside of court proceedings?

Although not expressly excluded, financial institutions are subject to a special regime. Otherwise, the Dominican legal system has no available processes to seize the assets outside of court proceedings.

Title to natural resources

- 20** Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The Dominican state has title to mineral deposits of every nature existing in national territory, including metallic minerals. Such minerals may be granted in usufruct by the state. The Dominican Mining Law No. 146 allows any national or foreign party to register the discovery of mineral deposits and request a concession in order to explore or exploit such deposits. An exploration concession grants its holder the right to carry out activities above or below the earth's surface in order to define the areas containing mineral deposits by using any technical and scientific methods. An exploitation concession is granted for a period of 75 years. Aside from tax regulations, the pursuance of mining activities requires the purchase of a mining business patent issued by the Ministry of Industry and Trade.

Royalties on the extraction of natural resources

- 21** What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Regimes may vary according to sector. Mining concessions, for example, provide for the annual payment of a mining patent calculated on a per hectare basis.

Export of natural resources

- 22** What restrictions, fees or taxes exist on the export of natural resources?

Restrictions may vary according to the sector. Under Dominican law, mining concessionaires for metallic minerals can only export their production after meeting the demands of the local market.

Environmental, health and safety laws

23 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

| Project sector | Law | Regulatory body |
|---|--|---|
| Mineral extraction | Law 64-00 on the Environment and Natural Resources Law No. 146-71, related to the regulation of mining activities | National Office of Mining Ministry of Environment and Natural Resources |
| Water | Law No 5994-62 and the Regulation for its application; Law No. 5852 Law No. 238-62 Law No. 5994-62, which creates INAPA | National Institute of Potable Water (INAPA) National Institute of Water Resources (INDRHI) |
| Electricity (generation, distribution and transmission) | Law 125-01 and the Regulation for its application | Superintendency of Electricity National Energy Commission |
| Ports | Law No. 70, dated 16 December 1970 Regulation No. 1673-80 on Port Services Regulation No. 309-98 on Port Concessions | Port Authority |
| Telecommunications | General Telecommunications Law 153-98 and the Regulation for its application | National Institute of Telecommunications (INDOTEL) |
| Tourism (hospitality) | Law 84-79, that creates SECTUR Tourism Organic Law No. 541-69 Law 158-01 on Promotion of Tourism Development | Secretariat of State of Tourism (SECTUR) |

Project companies

24 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Local and foreign financial institutions remain the most frequent option in terms of financing. A potential tax reform that is likely to create incentives for investors in the local public securities market may have a material impact in shifting this trend.

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