HEADRICK RIZIK ALVAREZ & FERNÁNDEZ

ATTORNEYS AND CONSULTANTS

Newsletter

September 30, 2015

NEW LAW ON RESTRUCTURING AND INSOLVENCY IN THE DOMINICAN REPUBLIC

Background

On August 7, 2015, a new law on Restructuring and Liquidation of Companies and Business Persons ("Law No. 141-15") was signed into law in the Dominican Republic. The law establishes mechanisms and proceedings to protect creditors in cases of financial difficulty of their debtors by allowing the latter to remain in operation and overcome the economic difficulties that thwart them from complying with previously undertaken obligations, thus achieving business continuity of companies and business persons. Likewise, the Law establishes a legal framework applicable to restructuring and cross-border insolvency proceedings. The Law will enter into effect on February 7, 2017, a date that is 18 months following its enactment.

Law No. 141-15 repeals and substitutes all laws and regulations on the matter prior to the same, and in particular, articles 437 to 614 of the Code of Commerce, as well as Law No. 4582 on Declaration of Bankruptcy, which dates to 1956. Prior to the enactment of the new Law, it was not possible to request the reorganization of the insolvent debtor in the Dominican Republic, given that all the laws applicable to insolvency proceedings solely referred to its liquidation.

Law No. 141-15 applies to national or foreign companies and business persons with domicile or continuous presence in the country (the "Debtors"). Debtors exclude commercial entities controlled by the State; financial intermediation entities regulated by the Monetary and Financial Law No. 183-02, dated November 2002, and its modifications; securities intermediaries, investment fund management companies, centralized security deposits, stock exchanges, securitization companies and any other entity considered to be a stock market participant, with the exception of publicly traded companies and companies governed by Law No. 19-00 on Securities Market, dated May 2000.

The Law creates a special jurisdiction for restructuring and judicial liquidation, comprised of Courts of First Instance (the "Court") and Courts of Appeals, both of which will be specialized to hear restructuring and liquidation proceedings, as well as any other judicial or extrajudicial action linked to the Debtor and its equity. However, until the new jurisdiction is created, the actions provided for in the Law will fall within the jurisdiction of the ordinary civil and commercial courts. The judicial restructuring and liquidation processes established under the Law will be carried out under the supervision of the Court, with the assistance and intervention of various parties, including experts appointed to assist the court in the process.

An interesting note is that any controversy derived from the execution of the Restructuring Plan (defined below) may be subject to resolution before institutional or ad-hoc arbitration. The request for

arbitration will not be a cause *per se* for the suspension of the restructuring process. Also, the arbitral tribunal may hear petitions for precautionary measures.

The Law sets forth a legal framework applicable to insolvency proceedings with international or cross-border effects, developed in accordance with the United Nations Commission on International Trade Law (UNCITRAL).

Restructuring Process

Restructuring is the process whereby a Debtor that, in the event of a temporal lack of liquidity or cessation of payments, can restructure its operations and continue operating, allowing the company's employment to continue as well as protecting and facilitating the preservation of assets in favor of the creditors recognized by the Debtor (the "Creditors"). The restructuring of the Debtor must be requested before the Court through a petition. Said petition can be filed by the Debtor or, alternatively, by any Creditor who has an asset (liability vis-à-vis the Debtor) in an amount that exceeds 50 monthly minimum wages and if the Debtor is facing any of the situations that can give rise to the right to petition under the Law (in particular, cessation of payments or any other event that leads a Creditor to believe that the Debtor is in a precarious financial situation).

Following the restructuring request, the Court has the obligation to appoint a person (the "Verifier"), who will have the duty to verify the Debtor's financial situation and inform the Court thereof. The Verifier may be assisted by experts on the matter and has ample powers to obtain information about the Debtor's business, assets and liabilities and financial situation (in particular, about the assets of the Debtor's business that are subject to the restructuring process, or the "Estate"). The Verifier is required to present his report to the Court within fifteen business days following his appointment. Within five business days following the presentation of the Verifier's report, the Court must decide whether to accept the restructuring request or deny the same.

The Law provides mechanisms for the participation by interested parties in the restructuring process. In that sense, during the review of the restructuring request and for as long as the restructuring process is in course, the Creditors have the right to appoint a physical or legal person to assume their collective representation during the procedures and actions provided for in the Law (the "Creditors' Advisor"). The creditors of securities of the Debtor issued in a public offering can also appoint a representative denominated the "Representative of Publicly Issued Securities". Likewise, the employees of the Debtor may also appoint a person who will act in the capacity of advisor for the employees (the "Employees' Advisor"). Advisors represent the collective interests of the respective interested groups with priority over other interested parties during the restructuring process.

In the event that the restructuring request is accepted by the Court, then such decision must be duly notified to the Debtor and the Creditors. The Court will then appoint a person (the "Conciliator") whose principal role is to mediate between the Debtor and its Creditors in order to reach a restructuring agreement (the "Restructuring Plan"). Furthermore, the Court will order the publication of an excerpt of the restructuring request in a newspaper of national reach in the country as well as on the court's website.

Upon appointment of the Conciliator, the conciliation and negotiation process is initiated (the "Conciliation"). During this process, the management of the Debtor's assets continues to be handled by the Debtor, but remains subject to the supervision of the Conciliator. Likewise, during the Conciliation, all judicial, administrative or arbitral decisions that affect the assets of the Debtor, any enforcement or eviction procedures regarding the Debtor's movable and immovable property, calculation of interest under loans and other credit documents, among others, are suspended. The Law calls for the ordinary functioning of the Debtor and his business during the Conciliation process.

Upon the request of the Conciliator, and provided there is no objection from the majority of Creditors, the Court may authorize new super-senior financing on account of the Debtor, in order to assure the continuity of the ordinary operations of the Debtor. In that same vein, the Conciliator may initiate an annulment action against acts executed by the Debtor undertaken within the two years prior to the restructuring request, when these have constituted an unjustified dissipation of the Debtor´s assets and have caused damage to the Creditors.

Following the beginning of the Conciliation process, the payment of debts must be carried out in the order described below:

i. Labor liabilities, if the same have not been advanced in application of the Labor Code or other laws related to social security or the employee's health;
ii. The costs of the restructuring process, including fees of officials and auxiliaries involved in the process;
iii. The loans agreed to by financial intermediation entities or third parties that will contribute to financing of the Debtor, and which have been duly authorized by the Court;
iv. The debts owed to essential and public service providers or suppliers, duly authorized by the Court;
v. The debts that result from the execution of agreements that remain in force after the beginning of the restructuring process, with respect to which the Creditor in question agrees to receive deferred payment; and,
vi. Other liabilities, according to their rank under law.

During the Conciliation process, the Creditors must declare and supply to the Conciliator the documents evidencing their assets (liabilities vis-à-vis the Debtor). After the Conciliator verifies and confirms such liabilities, this portion of the Conciliation process concludes with the publication of a final list of liabilities (subject to any annulment action that remains in course).

Once the liabilities have been verified, the Restructuring Plan must be presented. This proposal shall be presented by the Debtor or the Conciliator, in case an agreement with the majority of the participants of the process is reached. However, in the event that such agreement is not reached, liquidation will be recommended to the Court. The Restructuring Plan will contain, among other provisions, a payment plan for the company's liabilities and the company's business plan for at least the following 5 years. The Restructuring Plan can be organized through the constitution of a trust formed in accordance to the provisions of Law No. 189 on the Development of the Mortgage Market and Trusts in the Dominican Republic.

The Restructuring Plan proposal must be presented for review and subsequent approval, or rejection, of the Creditors. In the event that the Creditors reject the proposal, judicial liquidation of the Debtor may follow. However, if the Restructuring Plan proposal is approved by the Creditors, it must be presented to the Court for verification and subsequent approval. Once approved by the Court, the Conciliator is charged with overseeing compliance with the Restructuring Plan.

The Law establishes a special procedure for restructuring whereby the total liabilities of the Debtor do not exceed RD$10,000,000.00 (approximately US$222,000.00), and whereby the timeframes in court are reduced by half. In these cases, the minimum total liabilities to give rise to the right to file a request for restructuring is in an amount of at least 15 times the minimum monthly wage. The appointment of advisors for the Creditors or expert and auxiliaries for the Conciliator will not be applicable.

Likewise, it is noteworthy that the Law provides for "Pre-Pack Agreements", which may be presented if the Debtor and the majority of his Creditors reach a restructuring agreement prior to the commencement of the restructuring process. If this is the case, the Debtor and the Creditors must

present said "Pre-Pack Agreement" to the Court. If the plan is accepted by the Court, the Court must then appoint a Conciliator to oversee the execution of said plan.

Judicial Liquidation

Judicial liquidation is a process that may be initiated before the Court by the Debtor, at any given moment; by the Verifier, if there is a lack of information or efforts to thwart the duties of the Verifier by the Debtor, or when the Verifier determines that the Debtor is not in a position that makes possible a restructuring process; by the Conciliator during the phase of conciliation and negotiation, whether it is a result of the impossibility of assuming his functions because of the lack of cooperation by the Debtor or a determination that the Debtor will be unable to restructure; or by any of the Debtor, the Conciliator, any recognized Creditor or by decision of the majority of Creditor in the event of noncompliance with the terms of the Restructuring Plan. The Court must then designate a person who will act as the administrator of the liquidation process (the "Liquidator").

The notice of the judgment that orders a judicial liquidation entails that the Debtor immediately loses all right to manage and dispose of all properties until the judicial liquidation process has concluded. The Liquidator assumes the authority of the governing bodies. During the judicial liquidation process, the rights and actions of the Debtor are exercised by the Liquidator. Upon his appointment, the Liquidator assumes all management functions and powers of the Debtor. Likewise, during 3 consecutive days, the Liquidator must publish in a newspaper of national circulation and on the webpage of the Court an excerpt of the judgment that orders the liquidation, and must notify the judgment to the Debtor and the Creditors.

The liquidator must present a Liquidation Plan before the Court to maximize the recovery of the Debtor´s assets, recognizing the order of precedence of the liabilities, as recognized by the Law and common law. If the Liquidator has not undertaken the liquidation of assets given in guaranty within the 45 business days following the issuance of a judgment that orders the liquidation, Creditors that hold a guarantied credit, such a pledge or a mortgage, as well as the tax authorities, may exercise their individual right to pursue the assets granted in guaranty, even if their credit has not yet been admitted by the court.

The Court will order the conclusion of the liquidation process in any of the following cases: (1) when there is no outstanding liability or the Liquidator has sufficient sums to pay all Creditors; or (2) in the event of impossibility of the continuation due to the shortfall of assets. The judgment that orders the conclusion of the judicial liquidation due to a shortfall of assets will not permit the Creditors to subsequently file additional actions against the Debtor.

We will provide additional information on cross-border proceedings and other special proceedings under the Law in a separate note.