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## Dominican Republic

20 November 2017 Mary Fernández, Melba Alcántara Cornelio

### Brief overview of insolvency proceedings

A new law on Restructuring and Liquidation of Companies and Business Persons (Law No. 141-15) was signed into law in the Dominican Republic on 7 August 2015. Law No. 141-15, entered into effect on 7 February 2017. It repeals the provisions of the Code of Commerce and Law No. 4582 of 1956, which was an obsolete framework for bankruptcy that dates from the 19th century. The former framework only contemplated liquidation of businesses and did not provide for the possibility of a debtor's reorganisation. The new law significantly reforms the existing insolvency procedures, incorporating the recommendations of the UNCITRAL Model Law of 1997 with respect to cross-border insolvencies.

Law No. 141-15 contemplates two different proceedings: the reorganisation of entities experiencing temporary financial difficulties, and the liquidation of insolvent entities incapable of carrying on business. It provides for the obligation of the debtor to attempt to reorganise prior to the commencement of involuntary liquidation proceedings, although the person in charge of verifying the financial situation of the debtor may recommend the immediate liquidation under specific circumstances.

Law No. 141-15 also provides for a stay of all legal proceedings during reorganisation proceedings and the execution of a supervised restructuring plan that may last up to five years. In addition, the Law No. 141-15 creates new courts with exclusive jurisdiction to hear all matters regarding the insolvency process. The law also contemplates the appointment of conciliators, verifiers, experts and employee representatives; allows the debtor to contract for new debt, which will have super-priority status in relation to other secured and unsecured claims of the debtor; stipulates civil and criminal sanctions for non-compliance; and contemplates the possibility of coordinating cross-border proceedings.

### Court-controlled proceedings

Law No. 141-15 creates a special jurisdiction for restructuring and judicial liquidation, comprising courts of first instance and courts of appeal, both of which will be specialised to hear restructuring and liquidation proceedings. 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 Council of the Judiciary Branch

specialised two lower courts and two courts of appeals (one of each in Santo Domingo, the capital city, and the others in Santiago, the second-largest city in the country), to hear these cases until the new courts are established.<sup>1</sup>

The restructuring and liquidation courts will be competent to hear all actions related to the restructuring plan, as well any other judicial or extrajudicial action linked to the debtor and its equity. The restructuring and liquidation courts will also be competent to hear all possible measures to preserve the debtor's assets, including petitions for precautionary measures and protective actions. Civil or criminal actions for non-compliance with the law shall be heard by the ordinary courts.

## **Reorganisation proceedings**

Law No. 141-15 applies to national or foreign companies and business persons with domicile or continuous presence in the country, and excludes:

- 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, centralised security deposits, stock exchanges, securitisation 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 the Securities Market dated May 2000; and
- companies participating in the electricity sector.

The restructuring of the debtor may be requested through a written petition to the court. Under the terms of Law No. 141-15, a debtor could become subject to a restructuring proceeding – whether voluntary or involuntary – if one of the conditions established is met:

- failure to pay claims regarded as certain, due and payable under Dominican law for a period of more than 90 days, after formal notice to pay;
- when the debtor's current liabilities exceed the current assets for a period of more than six months;
- failure to pay withholding taxes to the tax authorities for a period of more than six fiscal quotas;
- failure to pay two consecutive salaries to employees on the corresponding payment date, with the exception of payments made in the hands of a third party when required by a court order, and of the 'economic assistance' set out by the Labour Code for businesses unable to produce funds;

- when the administration hides or remains vacant for a reasonable period of time and no officer is designated to comply with its obligations, suggesting the intention to deceive the creditors;
- when the closure of the business is ordered due to the absence of the administrators, as well as the transfer – partial or total – of its assets to a third party for distribution to all or some creditors;
- the use of deceitful or fraudulent practices, criminal association, breach of trust, falsehood, simulation or fraud to default creditors;
- the notification to creditors of the suspension of payments by the debtor, or of the intent to do so;
- the commencement of a foreign insolvency proceeding in the jurisdiction of the debtor's parent company or of its main place of business;
- the foreclosure of more than 50 per cent of the debtor's total assets; and
- the existence of decisions or sentence-enforcement procedures that may affect more than 50 per cent of the debtor's total assets.

### **Voluntary restructuring request**

Law No. 141-15 contemplates the commencement of the insolvency proceedings by the debtor at any moment. The restructuring request presented by the debtor voluntarily must be accompanied with:

- its financial statements for the last three fiscal years;
- a report explaining the debtor's economic condition and justifying the need for restructuring;
- a list of all its creditors and the status of all its claims and liabilities; and
- the authorisation of the management expressly approving the restructuring request, copies of bank account statements, among other documents.

A restructuring plan proposal must be presented for review and subsequent approval, or rejection by the creditors. In the event that the creditors reject the proposal, the liquidation of the debtor may follow. However, if approved by the creditors, the restructuring plan must be presented to the court for verification and subsequent approval.

### **Involuntary restructuring request**

If the debtor is facing any one of the situations that can give rise to the right to petition under the law, more specifically cessation of payments or any other event that leads a creditor to believe that the debtor is in a precarious financial situation, any creditor

who has a liability in relation to the debtor in an amount that exceeds 50 monthly minimum wages may request the restructuring of the debtor.<sup>2</sup>

The restructuring request filed by the creditors must be notified to the debtor within a period of three business days following the filing date, and shall include all the documents presented to the Court by the creditors. The creditors have the obligation to present proof of the notification before the court within a period of two business days, and failure to do so entails the dismissal of the request.

### **Conciliation and negotiation process**

Following the restructuring request, the court has the obligation to appoint a verifier within a period of three days, who will have the duty to verify the debtor's financial situation and inform the court thereof. The verifier is required to present his or her report to the court within 15 business days following his or her 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. In the event that the restructuring request is accepted by the court, such decision must be duly notified to the debtor and the creditors. The court will then appoint a conciliator, whose principal role is to mediate between the debtor and its creditors in order to reach a restructuring plan.

Upon appointment of the conciliator, the conciliation and negotiation process is initiated. Given that the law calls for the ordinary functioning of the debtor and his business during this process, the management of the debtor's assets continue to be handled by the debtor but remain subject to the supervision of the conciliator.

Upon initiation of the conciliation and negotiation process, all judicial, administrative or arbitral decisions that affect the assets of the debtor and any enforcement or eviction procedures regarding the debtor's property (moveable and immovable) are suspended until the reorganisation plan is approved.<sup>3</sup> However, the debtor's obligations to support their families and children (in the case of natural persons), labour and social security obligations, and payments made as a result of the ordinary course of business will not be suspended.<sup>4</sup>

If proposed by the conciliator (taking into account the position of the majority of creditors), the court must decide on the termination of existing contracts and the approval of new debt, the constitution of new collateral, the sale of assets and the disposal of assets that are not required for the ordinary course of business.

### **Effects of the approval of the restructuring request**

After the commencement of the restructuring proceeding, pending obligations shall be met by the debtor unless the judge specifically suspends the enforcement of a claim or continuation of a contract. However, lenders cannot take control of the underlying

collateral outside of a judicial proceeding.<sup>5</sup> If contracts are extended, such claims are treated as new debts and therefore acquire a higher priority in relation to other claims. Distributions are made to creditors on a pro rata basis, after deducting from the realisation value of the assets, the costs of the proceedings and the amounts paid to privileged creditors. If encumbered assets are sold, the secured creditors shall receive a proportion of the selling price.

Law No. 141-15 establishes the invalidity of contracts executed within 60 days prior to the commencement of the negotiation phase or after the initiation of the proceedings, provided they aggravate the situation of the debtor or accelerate the enforceability of claims not yet due. Additionally, pursuant to the terms of the law, no legal provision or contractual clause could give rise to the division, termination, resolution or annulment of the contract solely due to the acceptance of a reorganisation request or designation of the conciliator.

### **Suspect period**

Transactions made within a period of two years prior to the filing date of the reorganisation request might be annulled, provided that the court deems they constitute an unjustified diversion of assets or are detrimental to creditors. However, contracts on securities of public offering originated prior to the restructuring request and with subsequent settlement date are not subject of this annulment procedure. Any creditor, or the conciliator, could bring the annulment action through a judicial proceeding, and are required to provide proof of the invalidity of the challenged transaction.

### **New debts**

Under the terms of Law No. 141-15, debts acquired during the restructuring procedure have a higher priority in relation to all other secured and unsecured claims of the debtor, with the exception of tax claims, employee claims and claims resulting from the payment of the restructuring process, which are entitled to a higher priority status. Secured claims that benefited from collateral during the 'suspect period' may be subject to the invalidation of such collateral. However, bona fide pledgees may oppose the return of the asset until the secured obligation and any accessory rights are repaid or exchanged for equivalent collateral.

### **Advisers**

For as long as the restructuring process is in course, the creditors have the right to appoint a 'creditors' adviser' to assume their collective representation during the procedures and actions provided for in the law. The creditor's adviser has the obligation to:

- inform creditors of all actions concerning the restructuring process;
- assess the creditors on the approval of the restructuring plan proposals, the obtainment of new credits, offsetting of credits and the constitution of collateral; and
- request any information that may affect the creditor's rights through a written petition, among others.

The debtor's employees may also appoint a person who will act in the capacity of adviser of the employees. The employee's adviser, who may be an employee of the debtor or a third party, has the same functions as the creditor's adviser.

Advisers represent the collective interests of their respective groups during the restructuring process. However, in cases where advisers are not appointed, or are appointed and then removed, these interests will be directly assumed by the creditors or employees.

### **The restructuring plan**

In the event that the restructuring request is accepted by the court, a conciliator shall be appointed in order to develop a restructuring plan. The restructuring plan will contain, at least:

the debtor's background;

a summary of the restructuring plan, with a clear description of its main characteristics;

information concerning the financial situation of the debtor;

non-financial information of the debtor that may impact its future activity;

a description of the future operations of the debtor and the effects of the restructuring;

potential financial needs and the costs related to the proceedings; and

a payment plan for the company's liabilities and the company's business plan for at least the following five years.

In addition, the restructuring plan can be organised 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 reorganisation plan must be submitted for approval by the creditors and the debtor within 120 days from the date of appointment of the conciliator, which can be extended for 60 additional days. Reorganisation cases are formally concluded with the fulfillment of the reorganisation plan. However, in the event that the restructuring plan is not approved by the judge or has been rejected by creditors, judicial liquidation of the debtor may follow. If the restructuring plan is approved by the creditors, it must be

presented to the court for verification and subsequent approval. Once approved by the court, the conciliator shall oversee compliance with the plan.

## **Expedited reorganisations**

Law No. 141-15 establishes a special expedited restructuring procedure for cases where the total liabilities of the debtor do not exceed 10 million Dominican pesos (approximately US\$209,300.00). Time frames in court are also reduced by half and the appointment of advisers and auxiliaries for the Conciliator is not required.<sup>6</sup>

## **Liquidation proceedings**

### **Involuntary liquidations**

Law No. 141-15 establishes the obligation to attempt the reorganisation of the debtor prior to initiating involuntary liquidation proceedings. However, the verifier, at the initiation of the restructuring proposal and the conciliator, once the reorganisation is in place, may recommend the immediate liquidation under specific circumstances – such as the refusal of the debtor to recognise the reorganisation requested by the creditors, the recommendation made by the creditor’s representative, the non-approval of the reorganisation plan or failure to comply with the restructuring plan, among others.

The judicial liquidation of the debtor may be requested:

by the verifier (if there is a lack of information or efforts by the debtor to interfere with the duties of the verifier, or when the verifier determines that the debtor is not in a position that makes possible a restructuring process);

by the conciliator (during the conciliation and negotiation phase, due to the impossibility of assuming his functions because of the lack of cooperation by the debtor or to the determination that the debtor will be unable to restructure); or

by any of the debtor, the conciliator, any recognised creditor or by decision of the majority of creditors, in the event of non-compliance with the terms of the restructuring plan.<sup>7</sup>

### **Voluntary liquidations**

The debtor may request its judicial liquidation before the court at any moment. The notice of the judgment that orders a judicial liquidation entails the immediate loss by the debtor of his right to manage and dispose of all properties until the judicial liquidation process has concluded. The court must designate a liquidator, who will act as the administrator of the liquidation process and assume all management functions and rights of the debtor. During the judicial liquidation process, the rights and actions of the debtor are exercised by the liquidator.

## **Court-assisted proceedings**

### **Pre-pack agreements**

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 a restructuring process. The debtor and the creditors must present said 'pre-pack agreement' to the court, which must reject any restructuring petition filed with respect to the debtor for a period of 30 days following the request of the agreement.

The 'pre-pack agreement' proposal must be accompanied by a proposal for appointment of a conciliator, which shall be designated by the court, if the plan is accepted, to oversee its execution. The approval of the 'pre-pack agreement' shall be notified to the debtor and the creditors and produces the same legal effects as a restructuring plan.

### **Arbitration**

Under Law No. 141-15, any controversy or difference in interpretation arising in the course of a restructuring procedure, or derived from the execution of the restructuring plan, may be subject to resolution before institutional or ad hoc arbitration. The request for arbitration will not be a cause for the suspension of the restructuring process. Administrative actions related to the restructuring process, as well as all actions related to the liquidation, shall remain within the exclusive jurisdiction of the restructuring and liquidation courts.

### **Cross-border insolvency**

Law No. 141-15 sets forth a legal framework applicable to insolvency proceedings with international or cross-border effects, developed in accordance with the United Nations Model Law on Cross-Border Insolvency (UNCITRAL). The law provides that foreign creditors have the same rights and can rely on the same remedies available to local creditors.

Upon filing of the request for recognition of a foreign proceeding, all judicial, administrative or arbitral decisions that affect the assets of the debtor and any enforcement or eviction procedures regarding the debtor's property are suspended until the court reaches a decision. The foreign representative may request the appointment of an officer by the court for the distribution of all or part of the estate located in Dominican territory, provided that the court assures the protection of the rights of Dominican creditors. In addition, the foreign representative may request the verifier, conciliator or liquidator, the recovery of assets that belong to the insolvency estate and the annulment of acts that have constituted an unjustified dissipation of the debtor's assets and have caused damage to the creditors.



After the recognition of a main foreign insolvency proceeding, a local restructuring procedure can only be initiated if the debtor owns assets located in the Dominican Republic. The effects of said procedure are limited to the assets located in the Dominican territory, and any other assets pursuant to Law No. 141-15 shall be administered in accordance with the law.

Law No. 141-15 contemplates the possibility of processing local and foreign insolvency proceedings simultaneously, where the local court shall collaborate and coordinate its actions with the foreign proceeding.

### **First cases prosecuted under Law No. 141-15**

Presently, six months after the entry into force of the new restructuring law, the local courts have only decided four requests for reorganisation, three of which were requested by the debtors and were rejected by the court.<sup>8</sup> In the first case, the court deemed the debtor was requesting the reorganisation merely to avoid payment of taxes in view of enforcement actions initiated by the tax authorities. In a second case, the court also deemed the debtor requested the reorganisation to avoid fulfillment of overdue liabilities. The third case was rejected by the court for failure (of the debtor) to present the documentation required by law for voluntary reorganisations.<sup>9</sup>

A fourth case is still ongoing, and was requested by a creditor bank.<sup>10</sup> In its report, the verifier appointed by the court states that the debtor holds insufficient assets to cover its liabilities and is in no condition to satisfy its financial obligations, concluding that there are reasonable doubts about the debtor's ability to continue its operations. The decision to accept or deny the restructuring request is currently pending before the court.

With the experience of the first cases heard by the local courts, we expect more cases will be coming to these courts in the near future.<sup>11</sup>

### **Restructuring trends**

Mary Fernández states that 'the new law positions the Dominican Republic at the forefront of countries that promote economic growth through the establishment of clearer business regulations.' It will help save businesses that until now were only able to pursue their liquidation under a slow and inefficient process through which creditors recovered less than one-third of their investment, with a recovery rate of 9.3 cents on the dollar.<sup>12</sup> The law will not only help preserve but may also create incentives for new jobs, and most importantly, will serve as an encouraging development for foreign investors, with a new assurance that in the event of financial difficulties, their investment will be subject to a fair, effective and predictable procedure.

The authors also predict that pre-packs agreements will be widely used by Dominican debtors and creditors, for it will significantly improve the conditions for the amicable negotiation of the terms of the plan, as well as the times and costs involved in the restructuring proceeding.

## Notes

1. Act No. 44-2016, dated 7 December 2016.
2. Creditors are required to present before the court, among other documents, a list of the creditors filing the request; a copy of the documents that verify the creditor's rights or assets; a copy of the last financial statements (in the case of legal entities); a certification issued by the tax authorities confirming that the claimants are up to date with their fiscal obligations; and a power of attorney granted on behalf of the creditor's representatives. In the case of foreign creditors, a local representative shall be designated.
3. Prior to the enactment of Law No. 141-15, the bankruptcy declaration had no effect on secured creditors; however, interest payable on their claims could only be collected from sums generated through the use of the collateral. Secured creditors could only benefit from bankruptcy proceedings with respect to unsecured portions of their claims (except interest, which stopped accruing after the declaration of bankruptcy of the debtor by a judge).
4. The judgment that orders a judicial liquidation overturns the stay of all legal proceedings and resumes all actions against the debtor.
5. Secured creditors may exercise rights and remedies on a defaulted loan or obligation with respect to the collateral, prior to commencement of insolvency or bankruptcy proceedings.
6. The minimum creditor liability that may give rise to the right to file a request for expedited restructuring is equivalent to 15 times the minimum salary.
7. Prior to the enactment of Law No. 141-15, only unsecured creditors could bring the liquidation action through judicial proceedings after attempting an amicable settlement process; secured creditors could only participate in said proceedings provided they surrendered the right to the collateral.
8. Resolution No. 974-2017-SCON-00001 dated 6 April 2017, and Resolution No. 974-2017-SCON-00004 dated 3 October 2017, issued by the Restructuring and Liquidation Court of First Instance of the National District.
9. Resolution No. 904-2017-SCON-00003 issued on September 2017, by the Restructuring and Liquidation Court of First Instance of the National District.
10. Resolution No. 904-2017-SCON-00002 issued on 9 August 2017, by the Restructuring and Liquidation Court of First Instance of the National District.
11. We have been unofficially informed that other restructuring requests have been presented before the Restructuring and Liquidation Court of First Instance of the National District.

12. According to the Doing Business 2015 report published by the World Bank Group.

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