

GETTING THE DEAL THROUGH

# Mergers & Acquisitions

in 66 jurisdictions worldwide

# 2014

Contributing editor: Alan M Klein



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**Mergers & Acquisitions 2014****Contributing editor:****Alan M Klein****Simpson Thacher & Bartlett LLP**

*Getting the Deal Through* is delighted to publish the fully revised and updated fifteenth edition of *Mergers & Acquisitions*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

*Mergers & Acquisitions 2014* examines the law and regulation of business combinations and addresses the most important issues for international deals.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 66 jurisdictions featured. New jurisdictions this year include Angola, Mozambique, Panama, Portugal and Spain. Global and EU overviews are also provided.

Many legal disciplines come into play in large M&A deals. In particular, advisers must take account of competition regulation. This volume contains an appendix covering merger control rules across the world. For a more detailed analysis please refer to another volume of the *Getting the Deal Through* series: *Merger Control*.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.GettingtheDealThrough.com](http://www.GettingtheDealThrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise in this field. We would like to thank Casey Cogut of Simpson Thacher & Bartlett LLP for his stewardship of the title over the last fifteen years. We would especially like to thank and acknowledge Alan M Klein as contributing editor of this and future editions.

**Getting the Deal Through**

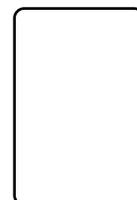
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# Dominican Republic

**Marielle Garrigó and Mariángela Pellerano**

Pellerano & Herrera

## 1 Types of transaction

How may businesses combine?

Business combinations are frequent transactions in the Dominican Republic, in which one entity gains control, or at least a controlling interest, in another entity. The preferred method of business combination is by way of a merger or voluntary acquisition. We do not have hostile takeovers in our jurisdiction.

One of the more common approaches to a business combination is the business merger. By this model, two or more businesses choose to combine their assets in order to form a new company or special purpose vehicle that is stronger and more capable or may be able to grasp a majority interest in the marketplace. The goods and services offered by the combined entity may consist of the combined product lines of the individual businesses, or be a revamped product line that takes the best sellers of each and couples them with a few new products developed by the new entity.

## 2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In addition to the company's by-laws, which are to some extent the regulatory framework agreed upon by the parties, the following statutes apply:

- the Law on Corporations as amended; and
- the Dominican Tax Code and the Regulations for its Application.

If a public company or a company that is registered on the Dominican Republic Securities Exchange is involved, then Law 19-00 may also apply.

Additional regulations may apply to specific industries. For instance, in the banking and insurance sectors the Monetary and Financial Law and the Insurance Law would apply. Likewise, in the energy and telecommunications sectors, the Law on Electricity and the Law on Telecommunications would also have to be taken into account at the time of structuring the transaction.

## 3 Governing law

What law typically governs the transaction agreements?

If the transfer of shares or assets of a Dominican company is involved, at some point Dominican Law would apply to some of the agreements. However, frequently New York law is used to the extent that it does not contravene any public policy and in the understanding that at some point the documentation may have to be translated (if executed in a language other than Spanish) for local registration purposes or to be filed before the authorities, if the need arises.

## 4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

If the company is registered on the Dominican Stock Exchange, the transaction would have to be notified as a 'relevant event'. From a tax perspective it is not unusual to notify the tax administration of a potential merger at least 15 days prior to the execution of the transaction to the limit the joint liability of the parties for any pre-existing taxes or future capital gains. As for stamp taxes they are not applicable; registration and transfer taxes may not apply in the context of a corporate reorganisation, which would have to be approved by the tax administration. If assets need to be transfer from one entity to another, taxes may vary depending on whether moveables are involved (18 per cent transfer tax, which operates like a VAT as is deductible as such) or real estate (2 per cent transfer tax calculated on the value of the property).

## 5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The tax administration reserves the right to ask for any information that it deems appropriate to assess the nature of any given transaction involving local assets. On the other hand, if it involves local companies, a shareholders' meeting may have to take place and usually such meeting is called by means of public notices. Assuming full quorum, the notice requirement may be waived; however, the minutes of the meeting and the new shareholding structure or any amendment to the by-laws would have to be registered at the Mercantile Registry, thus making the document public.

Additional publicity may apply depending on the approach chosen by the parties with respect to the workforce, namely, if the employees are transferred to a new entity a notice to that effect would have to be published at a visible place at the company and notified to the Ministry of Labour. Further formalities may be required if a trade union is involved or if a collective bargaining agreement is in place.

## 6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Such disclosure requirements apply to companies in certain regulated industries, such as banking or companies that participate in the Dominican stock market. For the banking industry, business combinations require authorisation from the monetary and

financial authorities and there are disclosure requirements for shareholders owning more than 3 per cent of stock in a financial intermediary. Business combinations constitute 'relevant facts' under the Dominican Stock Market Law; therefore the companies participating in the Dominican stock market must notify such transactions to the Securities Superintendency.

### 7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The board of directors and directors individually are subject to fiduciary duties. They owe to shareholders and to the company a duty of loyalty, a duty of care and a duty of disclosure. The law refers to the behaviour of a '*buen hombre de negocios*' (the common law equivalent could be a 'reasonable businessman'). In the context of a business combination, directors have the duty to act on an informed basis, which includes the appointment of a vigilance officer who shall issue a report on the business combination. Additionally, directors shall act in the best of interest of the company and its shareholders, abstaining from transactions where there are conflicts of interest and having the duty to disclose any conflicts if they exist.

### 8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholders have approval rights and the majority is set forth under the by-laws. As for appraisal, it is a condition precedent to the approval and is usually done by an expert, who will render a report and submit it to the company for the review of all the shareholders within a reasonable time prior to the meeting.

### 9 Hostile transactions

What are the special considerations for unsolicited transactions?

There are no hostile takeovers under Dominican law. This may be because there are no public companies in the Dominican Republic.

### 10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

See question 9.

### 11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

No. Industries that deal with national security remain under the direct or indirect control of the state.

### 12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Tender offers are regulated within the company's by-laws. In a cash acquisition the financing may be conditional if the parties agree upon such provision.

### 13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Obtaining financing would typically be a condition precedent for the closing of the transaction as for the assistance of seller it may vary depending on the industry. In some cases when governmental approval may be involved the cooperation of the seller is essential to expedite the authorisation process. Likewise, assisting the lenders in the due diligence process (by giving access to the premises, key employees and the like) are frequently included among seller's covenants during the signing and closing period. Additionally providing the lenders with access to the execution version of the documents, to the sellers' legal counsel and coordinating a working group that works toward the same goal is key for the successful outcome of the transaction for all parties involved: sellers, buyers and lenders.

### 14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

No, they may not.

### 15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Except when they involve matters of public policy, which require the application of certain statute or the laws of the Dominican Republic, parties may structure cross-border transactions in the manner that they deem most cost- and time-efficient.

### 16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

If the combination involves a corporate reorganisation, which requires the approval of the tax administration, the waiting period is normally between four and six months.

### 17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

See question 2.

### 18 Tax issues

What are the basic tax issues involved in business combinations?

Capitalisation taxes may have to be paid if the capital of one of the existing entities needs to be increased. Alternatively if a new entity is incorporated, capitalisation taxes would have to be liquidated based on the type of entity and the amount of the capital. Capitalisation taxes currently amount to 1 per cent of the difference for the capital to be increased in the entity.

Depending on the structure of the transaction, transfer taxes on real estate property and moveable assets may apply and subject to the participants involved such amounts may have to be withheld in the hands of the payer. Transfer taxes currently amount to 2 per cent of the value of the asset being transferred. Please note that the transfer of real estate property may not be possible if such asset is not up to date in the payment of the property tax, which currently amounts to 1 per cent per year calculated over the total amount of real estate property in favour of the company.

Value added tax may also be applicable. The current rate of the VAT is 18 per cent.

**Update and trends**

Congress has long been debating the need to have a Law on Bankruptcy and Financial Restructuring, which would have a material impact on business combinations and similar transactions if one of the parties involved is, voluntarily or not, involved in a bankruptcy or restructuring proceeding. The current draft of the law is being revised; however, it will have limited application when the parties involved are financial institutions. Likewise, there are strong signs that the financial sector may be subject to changes as savings and loans institutions (thrifts) are likely to be required to become full-service banks within a short period of time. There have been discussions as to the different alternatives to successfully achieve such a transition; however, at present there has been no final decision on the subject.

A substantial portion of these taxes may be reduced depending on the structure of the transaction that is whether or not it qualifies as a corporate reorganisation under the rules of the Dominican Tax Code.

**19 Labour and employee benefits**

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework is the Dominican Labour Code and the Law on Social Security. Also, if the entities involved belong to a union, the Collective Bargaining Agreement may have an impact on the transaction. Fringe benefits, to the extent that they are consistently given to employees will be considered as part of the salary. Also it is not unusual to have written agreements for temporary employees (namely those hired for a specific period of time or task)

or high-level executives or expats, which may have contractual arrangements setting forth the conditions for their entrance and golden parachutes in the event of change of control or early termination of their employment.

The transfer of employees from one entity to another is subject to the provisions of the Labour Code and entails a notice to the Ministry of Labour, a copy of which will be published at a place in the company where it can be seen by all the personnel. The assignee and assignor remain jointly liable regarding the employee and the employee retains his or her seniority from the original date of employment notwithstanding the date on which the transfer occurs. In other words, there is a continuation of the original employer-employee relationship although there may be a new employer.

**20 Restructuring, bankruptcy or receivership**

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A company that is in the process of bankruptcy may not engage in a business combination process without judicial intervention.

**21 Anti-corruption and sanctions**

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The anti-corruption and anti-bribery sanctions currently in force in the Dominican Republic are not linked specifically to business combinations, they are broadly applied and if one of the conducts sanctioned under the existing legal framework occurs in the context of a business combination the liable parties will be held liable.

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