

Dominican Republic

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&As are regulated by the Dominican Civil Code, Company Law 479-08, Securities Law 19-00 (if the companies are public companies registered on the Dominican Stock Exchange), and the Dominican Tax Code. Additionally, if the companies operate in regulated industries such as banking, insurance, free zones, telecommunications, transportation, and energy, special laws governing each regulated industry will apply to the M&A process. Finally, M&A transactions must also comply with antitrust and illegal competition legislation (Law 42-08).

1.2 Are there different rules for different types of company?

Yes; as indicated above, publicly-traded companies are subject to the rules established both in the Company Law and in the Securities Law, while privately-held companies are subject only to the Company Law. Also, if a company operates in a regulated industry, the law governing that industry will apply to the M&A transaction.

1.3 Are there special rules for foreign buyers?

No. Foreign and local investors are accorded equal treatment under article 221 of the Constitution of the Dominican Republic.

1.4 Are there any special sector-related rules?

As noted before, there are specific sector-related rules for regulated entities. For instance:

- A) Telecommunications are regulated by Telecommunications Law 153-98.
- B) Publicly-traded companies exchange is regulated by Securities Law 19-00.
- C) Free Trade Zone companies are regulated by Free Trade Zone Law 8-90.
- D) Border Free Trade Zone companies are regulated by Border Free Trade Zone Law 28-01.
- E) Insurance companies are regulated by Insurance Law 146-02.
- F) Banks and financial institutions are regulated by Monetary and Financial Law 183-02.

G) Electrical utilities companies are regulated by Electricity Law 125-01.

H) Hospital or health institutions are regulated by Public Health Law 42-01.

1.5 What are the principal sources of liability?

Parties must be aware of, among other variables depending on sector-related rules: (a) restrictions in the by-laws of the companies involved in the transaction; (b) their financial and tax status; (c) labour contingencies; (d) pending litigation; (e) environmental contingencies; (f) intellectual property rights; (g) ownership and status of assets (real estate, receivables, liens, encumbrances, warranties, etc.); (h) contractual obligations (concessions, licences, promissory notes, etc.); and (i) moveable assets liability.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Dominican Company Law establishes different business combinations allowing companies to gain control over other companies via a direct acquisition or spin-off, or join forces with a competing company via a merger or special purpose vehicle.

2.2 What advisers do the parties need?

The parties will require the assistance of attorneys to verify that the legal documents are correct, conduct a due diligence and draft or review the merger or acquisition documents. Financial and tax advisers (CPA) are required to audit the assets and liabilities involved in the transaction. The seller will need advisers to prepare financial statements, file taxes, and present projections. These advisers will also help the seller appraise the company. On the buyer's side, this type of adviser will assist with the financial viability of the operation. Environmental advisers are needed to assess the possible contingencies involved in the transaction, as well as public relations advisers depending on the brand image of the parties involved. Lastly, other specialised professionals may be required depending on the company's industry.

2.3 How long does it take?

The timeline will depend on the agreement which the parties have reached regarding the valuation of the acquisition target or of both

companies involved. After arriving at an agreement on the general valuation and other terms of the deal via an accepted Offer Letter, Memorandum of Understanding (MOU) or Letter of Intent (LOI), the parties may decide to start the due diligence process immediately and retain advisers and draft the necessary documents to execute the operation. The due diligence and preparatory process could take from five days to a month depending on the complexity of the transaction and the companies involved. Once the documentation has been signed, the filing process to record the acquisition takes from two to five working days. Obtaining an updated tax ID from the tax authorities, however, can take up to four months.

Transactions involving more than 30% of the shares of a public company must be approved by the Securities Exchange Commission. If the company is subject to a special regime, the approval of the pertinent regulatory body will be required. In these cases, the length of the process depends on the particular regulatory body involved.

2.4 What are the main hurdles?

The main hurdles in a M&A transaction are: (a) agreeing to the companies' financial valuation, be it that parties do not agree with the valuation methods used or that the parties' financial statements lack credibility; (b) complex corporate and tax structures which may increase the tax impact of the transaction; (c) regulated sectors' rules may increase the time of execution of the transaction; (d) existing collateral securities may cause divergent perceptions as to the importance of said contingencies; (e) labour rights contingencies; and (f) pending litigation cases.

2.5 How much flexibility is there over deal terms and price?

The Dominican Civil Code allows the parties to freely set the terms and conditions of any transaction except in certain instances. However, all M&A transactions must abide by the fair competition practices established in Competition Law 42-08, and the guidelines instituted in the Company Law. Also, the Dominican Tax Authority has become very sophisticated in asserting transfer pricing issues in M&A transactions, which could affect the pricing of M&A deals. Finally, M&A operations related to companies belonging to regulated sectors must comply with the legal framework governing that sector, which may be very rigid; for example, in the banking and insurance sector.

2.6 What differences are there between offering cash and other consideration?

M&A transactions may be freely done via cash offering, equity, a combination of both, or other forms of payment. It is important to analyse the corporate and tax structure of the parties involved to determine the tax implications of offering cash vs. equity vs. other payment alternatives.

2.7 Do the same terms have to be offered to all shareholders?

No, the Dominican Civil Code allows parties to set the terms of a transaction as they see fit; therefore, a shareholder may freely accept more or less for his or her shares.

2.8 Are there obligations to purchase other classes of target securities?

According to Dominican law, the buyer in a merger must acquire all shares and rights of the target company. However, if the transaction is structured as an asset acquisition, the buyer and seller can negotiate which assets to include in the transaction, provided that the rights of the shareholders are respected.

2.9 Are there any limits on agreeing terms with employees?

The Dominican Labour Code establishes that the terms and conditions of an employment agreement cannot be varied to the detriment of the employees under any circumstance. Moreover, the resulting/remaining legal entity from a merger would be responsible for all employment agreements of the absorbed company, since in effect there is a continuation of the original employer-employee agreement.

2.10 What role do employees, pension trustees and other stakeholders play?

All employment agreements must be respected by the new entity. The new entity will have to maintain the existing contracts with employees or terminate their agreements and pay the legal severance packages. Employee credits are preferred over other credits due to their nature. In cases where there is an employee union involved and there is a collective bargaining agreement in place, this may cause an impact on the transaction.

As for the role of bondholders, the merger agreement must be submitted for their approval, unless the reimbursement of their credits is offered to them via a newspaper publication. If the assembly of bondholders approves the merger agreement, the resulting/new entity will remain as the debtor of their obligations.

Other credit holders (stakeholders) may oppose the merger and seek relief from the courts. Their opposition, however, cannot suspend the merger agreement; it can only grant additional protection for the credit holders. In the case of a spin-off, the agreement does not have to be presented to the assembly of bondholders, but this does not entail that the resulting/absorbing entities are not liable to respond to the bondholders and other credit holders.

2.11 What documentation is needed?

The documents required will depend on the type of corporate structures involved in the M&A transaction. Nonetheless, in general, the following documents will be required:

1. M&A agreement.
2. Assembly meetings authorising the M&A agreement.
3. Minutes of the assembly meetings authorising the M&A agreement.
4. By-laws of the companies involved.
5. Resulting by-laws according to the M&A agreement.
6. Mercantile Registry of the companies involved.
7. IDs of shareholders of the companies involved.
8. Tax ID certificate of the companies involved.
9. Certificate of tax compliance from the Dominican Tax Authority.

10. Audited financial statements.
11. Real Estate property certificates.
12. Trade name and trademark certificates.
13. Non-litigation certificates.
14. Required operation licences or permits (depending on the scope of the activities of the acquired or target company).

Additional documents may be required for M&A transactions involving regulated companies.

2.12 Are there any special disclosure requirements?

Within 30 days of the signature of the M&A agreement, the parties must publish an extract or summary of the agreement in a national newspaper. If the companies are public companies, the M&A agreement must also be filed at the Dominican Securities Exchange Commission (SIV), along with an affidavit signed by the representatives of the companies expressing that the content of the M&A agreement abides by the law. Once reviewed by the SIV, and upon its approval, the SIV will publish its resolution in a national newspaper.

2.13 What are the key costs?

The main costs involved are: advisers' fees (financial, accounting and legal); notarial fees; government fees; mercantile registry fees; and taxes.

2.14 What consents are needed?

The consents required vary depending on the type of corporate structures involved in an M&A. For instance, for LLCs, General Partnerships and Limited Partnership, an Extraordinary General Assembly is required to authorise the M&A transaction. On the other hand, for Stock Corporations, in addition to the authorisation via the aforementioned assembly meeting, a Special Assembly may be required if there are preferred stocks involved. In all cases, a commissary accountant must be designated by the participating companies to verify that the valuation of the assets and the corresponding financial exchange is equitable.

Moreover, the consent or authorisation from regulators may be required for M&A transactions involving regulated companies.

2.15 What levels of approval or acceptance are needed?

Dominican Company Law establishes a minimum requirement of an absolute majority of the shareholders to approve a M&A transaction. This minimum approval requirement may be higher if so determined in the by-laws. Nonetheless, if the rights of the shareholders would be lessened as a result of the M&A, the unanimous consent of all shareholders will be required.

2.16 When does cash consideration need to be committed and available?

Cash consideration commitment and availability may be agreed between the parties involved. The M&A agreement will mandate how cash considerations must be paid. If other types of considerations are involved, the parties must include all necessary provisions in the agreement. Cash considerations for the liquidated price of the shares sold cannot exceed one-tenth of the nominal value of said shares or stock value.

3 Friendly or Hostile

3.1 Is there a choice?

At the moment, the Dominican legal framework does not contemplate the possibility of hostile M&A transactions, since the Dominican Securities Commission Exchange has yet to regulate the stock exchange market in the Dominican Republic – only bonds (debts) of public companies are traded through the Dominican Stock Exchange.

3.2 Are there rules about an approach to the target?

There are no hostile M&As in the Dominican Republic. All transactions follow the same rules as any business transaction would; namely, the parties are free to negotiate the terms and conditions of their agreement.

3.3 How relevant is the target board?

When a M&A involves a public company or stock corporation, the board must render a written report to all shareholders summarising the content of the M&A agreement, along with all required documents, for their analysis and review.

3.4 Does the choice affect process?

There is no choice. Please refer to questions 3.1 and 3.2.

4 Information

4.1 What information is available to a buyer?

The buyer has free access to the following documents:

- At the Mercantile Registry (local Chamber of Commerce):
 - Seller's by-laws.
 - Seller's last assembly meeting registered.
 - Seller's mercantile registry.
- At the Dominican Tax Authority:
 - Seller's Tax ID.
- At the Dominican Securities Exchange Commission (if a public company):
 - Seller's financial statements.
- At the Dominican Intellectual Property Office:
 - Trade name certificates.
 - Trademarks certificates.
- At the domicile of the seller:
 - Non-litigation/pending litigation certificate.
- For regulated companies, at the respective regulatory body:
 - Required operating licences or permits.

All required documents are regularly provided by the buyer, considering that there are no hostile M&A transactions in the Dominican Republic.

4.2 Is negotiation confidential and is access restricted?

Negotiations are confidential as long as the M&A agreement has not been signed. For public companies or regulated companies, the regulatory body must approve the M&A agreement before signing the final agreement.

4.3 When is an announcement required and what will become public?

Within 30 days of the signature of the M&A agreement, the parties must publish an extract or summary of the agreement in a national newspaper. If the companies are public companies, the M&A agreement must also be filed at the Dominican Securities Exchange Commission (SIV), along with an affidavit signed by the representatives of the companies expressing that the content of the M&A agreement abides by the law. Once reviewed by the SIV, and upon its approval, the SIV will publish its resolution in a national newspaper. Finally, all shareholders' approvals, by-laws, etc. must be filed at the Mercantile Registry; these records are public.

4.4 What if the information is wrong or changes?

If the information disclosed by the seller is wrong, there would be no protection for the buyer unless he can prove fraud or unless there is a specific remedy for the situation in the agreement. Moreover, when a regulatory body is involved and the misinformation derives from a failure or omission of its administrative duties, the buyer, according to Law 107-13, may hold the regulatory body liable. Finally, any individual or company that violates the Securities Law is subject to administrative, civil, and criminal penalties.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes, there is no restriction to doing so unless the seller has agreed otherwise in the M&A agreement. The transfer of stock is essentially free except for restrictions in the by-laws.

5.2 Can derivatives be bought outside the offer process?

Yes. There is no restriction to do so unless the parties have agreed otherwise.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

There are none.

5.4 What are the limitations and consequences?

The transfer of the shares of regulated companies may be subject to regulatory scrutiny and approval.

6 Deal Protection

6.1 Are break fees available?

Parties are free to agree on break fees.

6.2 Can the target agree not to shop the company or its assets?

Yes, the seller's shareholders may agree to protect deals from third parties, provided that such provisions are in accordance with the rule of law.

6.3 Can the target agree to issue shares or sell assets?

Yes, the seller may freely negotiate the issuance of new shares or sell assets, provided that it is done in compliance with the corporate interest of the company, following the company's by-laws and abiding with the Dominican Company Law.

6.4 What commitments are available to tie up a deal?

Shareholders may establish mechanisms in their by-laws or via an agreement duly approved by an Assembly Meeting, such as a LOI/MOU, including an exclusivity clause, to protect deals from third parties, provided that such provisions are in accordance with the rule of law. These type of agreements are typically executed between the parties, setting out the general terms and conditions under which their negotiations and an eventual transaction will be undertaken, including a timeframe and milestones prior to closing.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

As stated in question 2.5, all terms and conditions of M&A transactions are freely negotiated between the parties involved as long as they abide with the company's by-laws, Dominican Company Law and the rule of law.

7.2 What control does the bidder have over the target during the process?

Under Dominican legislation, there are no provisions which grant a bidder control over the target during a transaction; however, the seller's shareholders may establish mechanisms in their by-laws or via an agreement duly approved by an Assembly Meeting to protect deals from third parties, provided that such provisions are in accordance with the rule of law.

7.3 When does control pass to the bidder?

Control only passes to the bidder once the M&A agreement has been signed and formalised by the companies involved and the authorisation from the regulatory body, if required, is obtained.

7.4 How can the bidder get 100% control?

A buyer can only obtain 100% control once the M&A transaction has been finalised, in compliance with the law, and has acquired 100% of the seller's shares.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Please refer to question 2.12. The board of public companies has a legal mandate to publish an extract or summary of the M&A agreement. Moreover, regulated companies are subject to special regimes which mandate the publication of the M&A agreement or project to shareholders and the corresponding regulatory body.

8.2 What can the target do to resist change of control?

Companies are ruled by their corporate governance bodies which express themselves via assembly resolutions. Once the M&A agreement has been signed, the company's shareholders' meeting may refuse to approve the operation.

8.3 Is it a fair fight?

There are no hostile takeovers under Dominican law.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The major influences on the success of a M&A transaction are: transparency between the parties during negotiations; competent, transactional and business-driven advisers on both sides; good will of the parties; submitting all required paperwork appropriately; and avoiding the hurdles indicated in question 2.4.

9.2 What happens if it fails?

If a binding LOI/MOU was signed between the parties which included an indemnity or penalty clauses in the case of wrongful or wilful termination or interference, always abiding to the rule of law, the seller could be held liable. Otherwise, there would be no consequence unless bad faith or fraud is proven.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

In 2015, several laws have either been enacted or have begun execution, which have, or which may have, a great impact on M&A transactions: (a) Law 189-11, which regulates Dominican trusts; (b) Law 544-14, commonly referred to as the International Private Law; and (c) Law 141-15 of Corporate Restructuring and Liquidation. In addition, there are some bills in Congress which, if passed, may affect M&A operations in the future, such as the new proposed Civil Code and Securities Law.

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Fabio J. Guzmán-Saladín is the main point of contact within the firm for the corporate clientele. With an MBA from IE Business School in Madrid (one of the world's top business schools), as well as a *summa cum laude* law degree, he understands the needs of the business and commercial clients of the firm.

As the team leader of the corporate department working out of the Santo Domingo office of the firm, he has represented multinationals in complex contract negotiations with local government entities and local partners, as well as top-tier investment banks interested in financing local and international corporations working in the Dominican Republic.

Mr. Guzmán-Saladín is the current Vice President of the Dominican German Chamber of Commerce.

GUZMÁN ARIZA
ATTORNEYS AT LAW

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Guzmán Ariza is actively involved in complex corporate transactions in which whole or portions of businesses are transferred, divested or restructured. Members of our corporate team include two partners with both law and MBA degrees (Alfredo A. Guzmán and Fabio J. Guzmán-Saladín), as well as in-house tax and accounting counsels, which generally results in smooth mergers and acquisitions with less time spent on due diligence and negotiations.