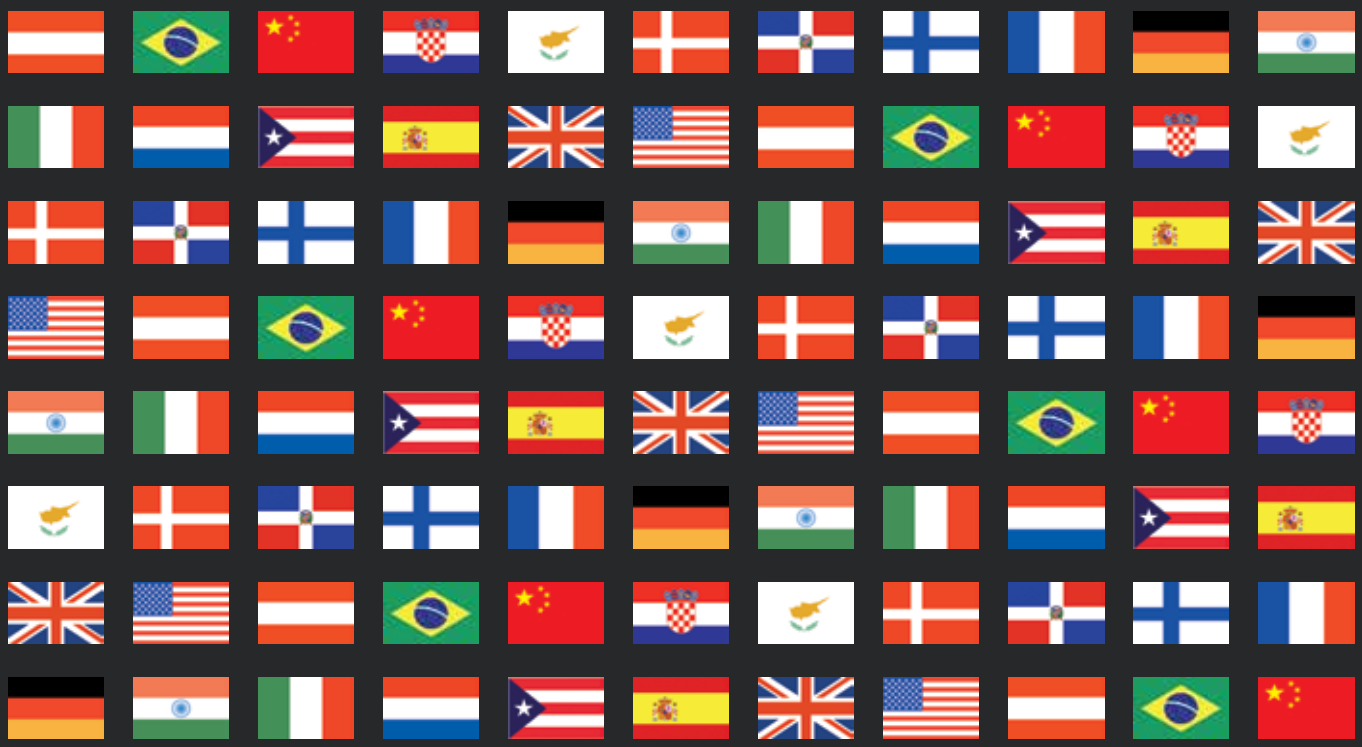
# Distribution & Agency

In 17 jurisdictions worldwide

*Contributing editor*
**Andre R Jaglom**



2015

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

# Distribution & Agency 2015

*Contributing editor*

**Andre R Jaglom**

**Tannenbaum Helpern Syracuse & Hirschtritt LLP**

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910


First published 2015
First edition
ISSN 2058-5608



Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

# Dominican Republic

**Georges Santoni Recio and Mónica Villafaña Aquino**
**Russin, Vecchi & Heredia Bonetti**

## Direct distribution

**1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?**

Yes. Since 1995 a foreign supplier may either establish its own Dominican entity or even register itself with local authorities to import and distribute its products.

**2 May a foreign supplier be a partial owner with a local company of the importer of its products?**

Yes. There are no limits on foreign participation in local importer companies.

**3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?**

Under the Dominican Companies Law No. 479-08, the three types of business entities best suited for such purpose are: the *sociedad anónima* (SA), the *sociedad anónima simplificada* (SAS) and the *sociedad de responsailidad limitada* (SRL). All are limited liability companies. Also, the sole proprietorship business entity, the *empresa individual de responsabilidad limitada* (EIRL) can be used.

Companies are formed via the enactment of the by-laws in a first shareholders' meeting, the appointment of the first manager(s), payment of 1 per cent of the designated social capital (100,000 Dominican pesos minimum requirement for SRLs, 3 million pesos for SASs and 30 million pesos for SAs), filing for registration and issuance of the Mercantile Registry granted by the Chamber of Commerce and Production of the company's domicile and finally filing at the Dominican Tax Department for the taxpayer ID number).

**4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?**

No. There are no restrictions or limitations on foreign businesses operating in the Dominican Republic, save for a few, very limited, exceptions generally related to national defence or 'strategic' industries.

**5 May the foreign supplier own an equity interest in the local entity that distributes its products?**

Yes.

**6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?**

The same taxes apply for all businesses operating in the Dominican Republic, regardless of their nationality or the nationalities of their shareholders or members. The principal taxes that would apply to distribution activities are: the corporate/personal income tax and capital gains tax at 27 per cent of all Dominican-source income in 2015 and dropping by 1 per cent yearly until it reaches 25 per cent, the value added tax (ITBIS) at 18 per cent for most products, the luxury tax at varying rates and the dividend tax (10 per cent withholdings).

## Local distributors and commercial agents

**7 What distribution structures are available to a supplier?**

There are various means of selling foreign goods or services in the Dominican Republic. Dominican law does not require that foreign suppliers have an agent or distributor in the Dominican Republic. Such suppliers can either: (i) make direct sales to Dominican purchasers; (ii) establish a subsidiary, branch, or sales office; or (iii) sell through Dominican agents or distributors. As a result, most forms of distribution structures are available for foreign suppliers doing business locally. Under the Dominican freedom of contract principle, the parties are free to choose the distribution structure they see fit.

**8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?**

Dominican Law No. 173 of 6 April 1966, as amended (Law 173), deals with suppliers-distributors, agents, etc, selling goods or services in the Dominican Republic, and it includes all natural or juridical persons engaged in the 'promotion or negotiation of the importation, distribution, sale or lease of products or services, or any type of trade or exploitation of foreign merchandise or products and the services related thereto [...] whether acting as agent, representative, importer, commission merchant, franchisee, or under any other designation'. Under this broad statutory language, both agents and distributors would be construed as subject to Law 173.

There are no special governmental agencies or authorities that regulate the appointment, use and termination of commercial intermediaries. Nonetheless, a very important aspect of Law 173 is that the local concessionaire must have registered the name of the foreign firm it represents and the terms of its agreement with the Foreign Exchange Department of the Central Bank. Non-registration generally bars a claim under Law 173. Since agents and distributors sometimes fail to register their agreements with the Foreign Exchange Department of the Central Bank, it is very important for foreign suppliers to submit a formal request to the Central Bank to determine whether the requisite registration was made before considering the termination or non-renewal of local concessionaires.

**9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?**

After an agent or distributor is appointed and duly registered before the Dominican Central Bank under the protection of Law 173, the foreign supplier may have very little flexibility in terminating the agent or distributor, even in the face of marginal performance. Also, the refusal of non-renewal is limited by Law 173. In any case, in order to terminate or refuse to renew a distribution relationship the foreign supplier must prove 'just cause', which is defined by Law 173 as a 'breach of one of the essential obligations of the contract'.

The protection under Law 173 consists of the imposition of substantial sanctions for termination made without 'just cause'. Law 173 makes no

distinctions between agents or distributors. They are referred to as concessionaires, and include any type of distribution or representation relationship in the Dominican Republic.

The burden of proving 'just cause' falls to the foreign supplier. The local agent or distributor is only required to prove that termination or non-renewal took place. Contractual provisions whereby the principal is allowed to terminate the agreement without cause, such as upon a minimum notice, are ineffective because of the public order nature of Law 173. In addition, pursuant to article 2 of Law 173, non-renewal of the distribution agreement is deemed equivalent to termination.

**10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?**

Article 3 of Law 173 establishes the indemnity formula for terminations or failures to renew without just cause.

> *ARTICLE 3. Every concessionaire shall have the right to sue the licensor in case of destitution, substitution or termination of the concession contract existing between them, or due to refusal to renew said contract, unilaterally or without just cause on the part of the Licensor, for the complete and just indemnification of the damages and losses caused by such reason, which amount shall be fixed based on the following factors:*
>
> *a All losses sustained by the concessionaire due to the personal efforts he has put in for the exclusive benefit of the business he is deprived of, including expenses for payment of compensations established by the labour laws.*
>
> *b The present value of the investment in the acquisition or lease of the premises and its fitness, of the equipment, installations, furniture and fixtures, in case these were only used for the business he is deprived of.*
>
> *c (Amended by Law No. 263 dated 31 December 1971) The value of the promotions of the services offered as per the commercial prestige of the agent, of the merchandise and products, parts, spare parts, accessories and fixtures that he has in stock and from whose sale, lease or exploitation he shall cease to benefit from; this value shall be determined by the acquisition and transportation cost to his warehouse or office, plus taxes, duties, inland freight charges and any other charges caused by the delivery of the merchandise to his warehouse or office; and*
>
> *d (Amended by Law No. 622 dated 28 December 1971) The amount of the gross profits obtained by the concessionaire from the sale of the merchandise, products or services during the last five years, or if the commercial relationship has been for less than five years, five times the average annual gross profits obtained during the last years, irrespective of what they amount to. In case the concessionaire had represented the Licensor for more than five years, the latter shall pay, in addition, the amount resulting from multiplying the number of years in excess of five years by one tenth the average of the gross profits obtained during the last five years of representation.*

As mentioned, Law 173 is a 'public order' law whose provisions may not be superseded by private agreements among the parties. Nevertheless, one important exception refers to distribution agreements signed with US companies.

With the promulgation of the Dominican Republic–Central American Free Trade Agreement with the United States (DR-CAFTA) on 1 March 2007, Law 173 is no longer of mandatory application to US companies. Only if the parties expressly choose for the distribution agreement to be governed by Law 173 will such law be applied, otherwise the agreement will be governed by its own terms and by general contract law, which means that term and termination provisions would be valid and enforceable.

**11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?**

Yes.

## Regulation of the distribution relationship

**12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?**

No. That would fall under the freedom of contract principle.

**13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?**

Yes. In practice it is common to see non-compete provisions in distribution agreements, especially if the distribution is exclusive. Generally, parties can agree to non-compete clauses as they wish, provided such non-compete restrictions allow the distributor a freedom of enterprise, and do not completely limit their ability to do business in general.

**14 May a supplier control the prices at which its distribution partner resells its products? If not, are there permitted ways in which the supplier may influence resale pricing? How are these restrictions enforced?**

For non-regulated sectors, resale prices can be agreed to in the contract and the supplier may control pricing as a result of a mutually agreed provision. Specific sectors, such as telecommunications services, fuels, insurance and others, are limited by local laws regardless of contractual limitations or prohibitions.

**15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?**

Yes.

**16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?**

Yes.

**17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?**

No.

**18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are these restrictions enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?**

Yes, a supplier may restrict geographic areas or categories of customers, exclusive territories are permitted and a supplier may reserve certain customers to itself.

**19 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?**

Yes. A supplier may restrict its distributor's ability to deal with particular customers.

**20 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?**

Dominican Antitrust Law No. 42-08 establishes restrictions for competitors to collude or agree among themselves to fix prices or restrict competition in any other way. As a result, unless the local distributor and supplier are competitors in the Dominican market, such antitrust rules would not apply.

Law No. 42-08 created an antitrust agency, the National Commission for the Defence of Competition (Pro-Competencia) to regulate and oversee free competition. Private parties can file claims with Pro-Competencia, which may initiate investigations that eventually result in fines. Fines range from 30 to 3,000 times the minimum wage in cases of antitrust violations.

**21 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?**

No. Dominican courts have decided that parallel imports by a third party are generally allowed, so long as the origin of the products is licit. Courts have decided that it shall be responsibility of the supplier to prevent third parties from been able to buy their products and import the same to an already assigned territory.

**22 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?**

There are no restrictions on advertisement or marketing. The parties may agree that the distributor shall be responsible for all or part of the advertisement and marketing costs.

**23 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?**

Suppliers may register trademarks, trade names, patents, copyrights and trade secrets in the Dominican Republic. The principal registration entity is the National Office of Industrial Property (ONAPI). Trademark rights are considered territorial in the Dominican Republic, therefore ownership of trademarks abroad does not necessarily entail local protection, and therefore registration via ONAPI is advisable to safeguard such rights. The supplier being the registered owner of the trademark, it will be able to restrict its use as it deems fit. Technology-transfer agreements are common.

**24 What consumer protection laws are relevant to a supplier or distributor?**

Law No. 358-05 (the Consumer Protection Law) is considered a public order statute. The Law creates and establishes Pro-Consumidor, a governmental agency for the protection of consumers with the ability to order product recalls, establish fines and destroy harmful products.

**25 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?**

The Consumer Protection Law establishes the mandatory recall of any products that are deemed to be harmful to consumers. The cost and sanctions associated with a product recall will be the responsibility of the local supplier (in this case the local distributor), nonetheless the Consumer Protection Law has a long reach and in recalls based on harm to the public health, it may reach the manufacturer.

The supplier and distributor may determine in the agreement the party responsible for carrying out and absorbing the cost of a recall.

**26 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?**

A supplier may limit the warranty provided to its distributor in an agreement between the parties. Nonetheless pursuant to the Consumer Protection Law, the local distributor must grant the end-user a warranty for the same length as provided in the country of origin of the products.

**27 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?**

The supplier and distributor may exchange information about customers and end-users, provided such data is not protected by the law. Data protection is limited by Dominican Law No. 172-13. Any information regarding racial or ethnic origin, religious, political and sexual preferences, union affiliation and health information is protected and cannot be revealed or shared without the consent of the owner of such data.

**28 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?**

Yes, a supplier may contractually reserve the right to approve or reject the individuals who manage the distribution partner's business, although in a Law 173 covered contract, the courts may determine that such is not sufficient just cause for termination or non-renewal.

**29 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?**

It would be very difficult for an agent or distributor to be considered an employee. A court would have to determine that the agency or distributorship agreement is a sham and all the elements of a labour relationship are present, such as subordination, attendance requirements, payment of a salary, etc.

The best protection is for the supplier to enter into an agreement that clearly establishes the role and responsibilities of its agent or distributor.

**30 Is the payment of commission to a commercial agent regulated?**

No.

**31 What good faith and fair dealing requirements apply to distribution relationships?**

There is a statutory presumption in the Dominican Civil Code that all agreements are presumed to be entered into and carried out in good faith.

**32 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?**

No.

**33 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?**

In principle there are no other restrictions or limitations on provisions in distribution contracts regarding their enforceability. We are not aware of any mandatory provisions. If a contract is entered into in the Dominican Republic or is to be performed in the Dominican Republic, absent any mention to the contrary, Dominican law will be presumed to apply.

## Governing law and choice of forum

**34 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?**

For contracts governed by Law 173 being a public order statute, Law 173 will apply. For contracts not governed by Law 173 (ie, signed after DR-CAFTA with a US concessionaire), the parties' contractual choice of country law is valid.

**35 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?**

Dominican law would apply to an agreement with local concessionaires notwithstanding a choice of law clause in their agreement because of the 'public order' nature of Law 173. Similarly, a choice of forum provision in an agreement would be rendered equally ineffective. The Dominican Supreme Court has interpreted Law 173 as precluding application of foreign law and jurisdiction. Hence, the choice of foreign law and submission to foreign courts or an arbitration panel will not prevent a Dominican court from applying Law 173. Nevertheless, it may be convenient for a foreign supplier to nonetheless include foreign law as governing so as to strengthen its position in the event that its agent or distributor should attempt to seek

enforcement of a Dominican Republic judgment in a foreign court. The imposition of Dominican Republic law, substantially altering mutually agreed-upon obligations of the parties in a situation where the parties previously have chosen a foreign law as governing, may be construed as repugnant to the public policy of the foreign court before which enforcement of the judgment is sought. Arbitration and other forms of alternative dispute resolution are not precluded under Law 173, but there is no guarantee that a Dominican court would respect such a choice.

However, a recent decision by a Dominican court of appeals found that Law 173 does not preclude the parties from choosing a non-Dominican arbitration forum. Specifically, it declared as valid a clause in a distribution agreement where the parties chose the International Chamber of Commerce (ICC) as a dispute resolution forum. The ruling indicated that, notwithstanding Law 173 'public order', the election of an arbitration forum its valid, so long as the merits of the dispute are resolved on the basis of Law 173 (see Ruling No. 633-2010; File No. 026-03-10-00100; 8 October 2010; Second Chamber of the Civil ands Commercial Courts of Appeals of the National District).

**36 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?**

Dominican courts are available to resolve any disputes. Foreign entities, in general, are fairly treated. Although litigants may require disclosure of documents or testimony from an adverse party in specific cases upon the order of the court, there is no 'discovery' analogous to that which exists in other jurisdictions.

**Update and trends**

There are no proposals that we are aware of to eliminate or reduce the impact of Law 173, however, after the carveout of Law 173 by the DR-CAFTA agreement and legislative and court decisions in other countries in the region limiting the effect of local distribution protection statutes, it may be that in the not-too-distant future Law 173 will be eliminated or its provisions reduced.

**37 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?**

Mediation or arbitration clauses in non-Law 173 contracts would be enforceable in the Dominican Republic. Choice of arbitration tribunal, location, language, etc, can be chosen freely by the parties. Arbitration offers advantages in cases where a fast decision is important, since Dominican courts tend to be somewhat slow and proceduralistic in rendering decisions.

For distribution contracts governed by Law 173, in principle Dominican courts are mandatory, nonetheless, as indicated above, there has been a recent appellate court decision that validated a foreign arbitral choice of forum.

RUSSIN, VECCHI
& HEREDIA BONETTI

**Georges Santoni Recio** **gsantoni@rvhb.com**
**Mónica Villafaña Aquino** **mvillafana@rvhb.com**

2 El Recodo Street
Monte Mirador Building, 3rd floor
Bella Vista
Santo Domingo
Dominican Republic

Tel: +1 809 535 9511
Fax: +1 809 535 6649
www.rvhb.com

*Getting the Deal Through*

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Government Investigations
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

*Also available digitally*

# Online

www.gettingthedealthrough.com

# iPad app

Available on iTunes

Law Business Research

*Book title*
*ISSN 2058-5608*

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

*Official Partner of the Latin American Corporate Counsel Association*

ABA Section of International Law
*Your Gateway to International Practice*

*Strategic Research Sponsor of the ABA Section of International Law*