The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research

The Mergers & Acquisitions Review

The Mergers & Acquisitions Review

Reproduced with permission from Law Business Research Ltd.
This article was first published in The Mergers & Acquisitions Review - Edition 8
(published in August 2014 – editor Mark Zerdin).

For further information please email
Nick.Barette@lbresearch.com

The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research Ltd

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-16-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ÆLEX

AGUILAR CASTILLO LOVE

AKD N.V.

ALLEN & GLEDHILL LLP

ANDERSON MŌRI & TOMOTSUNE

ARIAS, FÁBREGA & FÁBREGA

ARIAS & MUÑOZ

BEITEN BURKHARDT RECHTANSWALTSGESELLSCHAFT MBH

BHARUCHA & PARTNERS

BNT ATTORNEYS-AT-LAW

BOWMAN GILFILLAN

BREDIN PRAT

BRIGARD & URRUTIA

CAMPOS FERREIRA, SÁ CARNEIRO & ASSOCIADOS

CLEARY GOTTLIEB STEEN & HAMILTON LLC

COULSON HARNEY

CRAVATH, SWAINE & MOORE LLP

DEGUARA FARRUGIA ADVOCATES

DELFINO E ASSOCIATI WILLKIE FARR & GALLAGHER LLP

DENTONS

DITTMAR & INDRENIUS

DRYLLERAKIS & ASSOCIATES

ELİG ATTORNEYS-AT-LAW

FENXUN PARTNERS

HARNEYS

HENGELER MUELLER

HEUKING KÜHN LÜER WOJTEK

ISOLAS

KBH KAANUUN

KEMPHOOGSTAD, S.R.O.

KIM & CHANG

KING & WOOD MALLESONS

KINSTELLAR, S.R.O., ADVOKÁTNÍ KANCELÁŘ

MAKES & PARTNERS LAW FIRM

MANNHEIMER SWARTLING ADVOKATBYRÅ

MATHESON

MNKS

MORAVČEVIĆ VOJNOVIĆ I PARTNERI IN COOPERATION WITH SCHÖNHERR

MOTIEKA & AUDZEVIČIUS

NISHIMURA & ASAHI

OSLER, HOSKIN & HARCOURT LLP

PÉREZ BUSTAMANTE & PONCE

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU & ASOCIAȚII

RAIDLA LEJINS & NORCOUS

ROJS, PELJHAN, PRELESNIK & PARTNERS

RUBIO LEGUÍA NORMAND

RUSSIN, VECCHI & HEREDIA BONETTI

S HOROWITZ & CO

SANTAMARINA Y STETA, SC

SCHELLENBERG WITTMER LTD

SCHÖNHERR RECHTSANWÄLTE GMBH

SELVAM & PARTNERS

SEYFARTH SHAW LLP

SKRINE

SLAUGHTER AND MAY

STRELIA

SYCIP SALAZAR HERNANDEZ & GATMAITAN

TORRES, PLAZ & ARAUJO

URÍA MENÉNDEZ

UTEEM CHAMBERS

WEERAWONG, CHINNAVAT & PEANGPANOR LTD

WILSON SONSINI GOODRICH & ROSATI

CONTENTS

EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2014

Chapter 19

DOMINICAN REPUBLIC

María Esther Fernández A de Pou,
Mónica Villafaña Aquino and Laura Fernández-Peix Perez[1]

I OVERVIEW OF M&A ACTIVITY

In the past year, we have seen important mergers taking place. Also, several cross-border mergers and acquisitions have affected the Dominican Republic, as will be indicated further in this chapter. In both scenarios the mergers and acquisitions occurred in different and significant sectors of the economy, and have been on an increase in comparison with previous years.

As in all the rest of the world the financial crisis has affected the Dominican economy, however, major foreign investments continue to develop and grow in the Dominican Republic, which are consistent with the recent level of M&A activity in the country.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

In the Dominican Republic, M&A deals occur through merger by incorporation of a new entity, or absorption of one or more of the companies merged; share transfer; and asset purchase.

On December 2008 Law 479-08 of General Companies and Limited Liability Individual Enterprises was enacted, and later modified by Law No. 31-11 (the Companies Law). This law repealed the provisions effective until the current date of the Commercial Code regarding companies (articles 18 to 64 inclusive) and introduced important legal modifications concerning the incorporation, life and dissolution of companies, and in addition to the existing corporate vehicles, introduced three new corporate vehicles:

1 María Esther Fernández A de Pou is a partner, Mónica Villafaña Aquino is a senior associate and Laura Fernández-Peix Perez is an associate at Russin, Vecchi & Heredia Bonetti.

limited liability companies (SRLs), limited liability individual enterprises (EIRLs) and simplified companies (SASs).

Moreover, Chapter IV of the Companies Law provides a definition for the term 'merger' and establishes a process for its fulfilment from a corporate standpoint. This law defines merger[2] as the transfer made by one or more companies of its assets and liabilities, either to an existing company or to a new one, whereby the shareholders of the company that makes the transfer receives shares in the company or companies that receive the assets and liabilities, and eventually, a liquid amount that cannot exceed one-tenth of the nominal value of the shares.

The merger must be approved by the shareholders of all of the companies that are involved, and will entail the following consequences: the dissolution without liquidation of the companies that disappear, and the transfer of all their assets and liabilities, in the state that they are in on the date of final completion of the transaction to the beneficiary companies; and simultaneously the members of the disappearing companies become shareholders in the recipient companies. When as a result of a merger a new company is incorporated, its by-laws must be approved by the extraordinary general assembly of all of the companies that will cease to exist, and the incorporating assembly of the new company must confirm and acknowledge said approvals. The companies involved must execute a merger agreement.

Before the approval of the merger, the companies involved in the transaction must appoint one or more commissioners, who must render a written report with the particulars of the merger and shall verify that the value attributed to the shares of the participating companies are adequate and that the rate of change is equitable. Additionally, the report must include the estimated value of in-kind contributions and particular advantages, if there are any. The report will be made available to the shareholders prior to the assembly, and must be taken into consideration in the assembly before approving the merger.

Commissioners must have a bachelor's degree in accounting, business administration, finance or economics, and at least three years of experience in their profession. There are certain conditions that prohibit the following individuals from being appointed:

- *a* those convicted of criminal offences and bankruptcy (fraudulent or not) by an irrevocable judgment;
- *b* those disbarred by virtue of a judicial or administrative decision from the practice of commercial activities;
- *c* public officers with duties related to the activities of the company;
- *d* the founders, in-kind contributors, beneficiaries of particular advantages, directors of the company or its subsidiaries and their relatives up to the fourth degree;
- *e* the directors (and their spouses) of other companies that own one-tenth of the paid capital of the company in question; and
- *f* any individual (or their spouse) who directly or indirectly receives a salary or compensation from the company for undertaking permanent activities different of the those that belong to the commissioner.

2 Article 382 of our Companies Law.

The commissioners may require the delivery of all useful documents related to the merger from all of the companies involved, and make the necessary confirmation of their content. Likewise, depending on the types of companies, the boards of directors of the companies involved must render a written report on the merger project.

Within 30 days of the execution of the merger agreement, the companies involved in said process must file it along with the assemblies that approved said agreement before the corresponding chamber of commerce. Additionally, an extract with the main terms of the merger agreement must be published in a newspaper with national circulation.

In contrast, a shareholders' meeting is not always required when an acquisition is made through an assets purchase, it will depend on the type of assets being purchased and what the by-laws' requirements are. If a company is selling all its assets, the shareholders must approve such sale. Nonetheless, the law and principles that govern the agreement itself will be those of the Dominican Republic's Civil Code. Notwithstanding this, the parties are free to choose the jurisdiction that will govern the agreement.

Regarding the acquisitions made by share transfer, depending on the type of entity that is selling the shares, and the provisions of the by-laws, existing shareholders may have right of first refusal and in some cases tag-along rights. The Companies Law governs said transfer.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Regarding takeover provisions, our Companies Law provides that in every company, except for limited liability companies (LLC), any shareholder (individual or legal entity) that reaches a participation of more than 10 per cent of the voting shares must notify the company via a bailiff's act, within a 15-day period counted from the acquisition of shares that led to said amount or higher, indicating the amount of shares owned, and the votes it has in a shareholders' meeting. LLCs are excluded from this requirement, presumably because the law specifically provides for its shareholders and the company itself rights of first refusal, whereas in other companies such provisions are only in place if they are included in the company's by-laws, thus an LLC, because of its *intuitu personae* foundation, always knows the intention of its shareholders to transfer shares in advance, the amount of shares being transferred, and can take action on the transaction should it wish to do so.

The law also provides that a corporation cannot have investments in another company if the latter holds 10 per cent or more of the capital of the first one. Likewise, there is a similar provision for any other type of company that has a corporation among its shareholders.

Even though Law 19-00 of securities regulates the stock market and the Companies Law provide certain provisions applicable to corporations whose shares are publicly traded, to this date there is not a single company that is publicly traded, thus the probability of a hostile takeover occurring on a Dominican company is very remote.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The vast majority of M&A transactions that have occurred in the Dominican Republic have been from foreign investments, and from different countries. As a result of the financial crisis, business synergies, mergers and consolidation keep growing, as a way to cope with the difficult economic conditions.

Banking institutions, local and foreign, have a prominent influence on M&A transactions.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Mergers and acquisitions have been on the rise during recent years; while there might not be a significant impact in the volume of transactions taking place, the settlement for the transactions and the high-profile entities that have merged or have been acquired have increased exponentially.

Over the past few years the most relevant mergers and acquisitions have been the following.

a In 2013:

- two important local banking institutions and their related brokerage firms merged. The two companies have been negotiating the merger on and off for approximately 10 years.
- a European telecommunications giant acquired the second and third-largest telecommunications companies in the Dominican Republic. The transaction for both acquisitions was of approximately US$1.8 billion. Both local companies were later merged, and due to this merger two important market players have disputed the merger and requested that it be voided arguing violations to competition dispositions of the law and rules for the telecommunications sector.
- The shares of a company that owned gas stations located in the Dominican Republic were acquired by a company originally from Barbados.
- An internationally renowned insurance firm acquired a well-known local accounting and insurance brokerage firm.

b In 2012:

- A Brazilian brewery bought 51 per cent of the Dominican national brewery, for approximately US$1.24 billion.

c In 2011:

- The shares of a company that owned gas stations located in the Dominican Republic were acquired by a company originally from Barbados and a local tycoon.
- A Colombian entity acquired a majority stake (73.11 per cent) on a Dominican ice cream company.
- One of the top poultry companies in the Dominican Republic sold 80 per cent of its shares for over US$95 million to a Venezuelan group.
- A Colombian insurance company acquired a Dominican insurance company that owned 11 per cent of the market.

Likewise, cross-border mergers and acquisitions have also affected the Dominican Republic. Among those transactions, the main ones affected the airlines, mining and book publishing industries.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Typically, mergers and acquisitions are financed through loans, which are guaranteed by: assets of the buying company, or one or more of its subsidiaries; debt finance; or private equity funds.

When financed through loans, there are usually several banks involved in the lending. In the case of Dominican banks, solvency ratio restrictions are determined by our Monetary and Financial Law No. 183-02, which places certain boundaries on the lending bank with regards to the amount that can be lent to a single entity or economic group. Moreover, while Dominican banks are participants in the financing of different mergers taking place in the Dominican Republic, the main lenders are almost always foreign banks, particularly US banks.

As indicated above, when a bank grants a loan, usually certain assets of either the parent company or one or more of its subsidiaries are given in guarantee. If the assets placed in guarantee are located in the Dominican Republic, depending on the type of assets, there are filings and recording processes to be fulfilled. Typically, tangible assets (such as machinery, equipment, vehicles) are given in chattels without loss of possession, governed by No. 6188 of Agriculture Foment (Law No. 6188). There are certain formalities and restrictions surrounding chattels without loss of possession, for example, the borrower cannot grant a chattel over assets that have already been pledged unless the previous lender renounce to its rights. Also, the contract must be executed before a justice of the peace judge or a public notary and it must be recorded by the justice of the peace of the domicile of the borrower in order to make it opposable to third parties and in this way safeguard the privilege that the creditor is entitled to with the subscription of this type of contract. Furthermore, if the assets are vehicles, in addition to the chattel without loss of possession recordation, a transfer opposition is recorded before the Tax Office in order to avoid the transfer of the registration of the vehicles.

When the guarantee is a real state property, it must be recorded before the corresponding title registry of the real state property, and a 2 per cent lien over the value of the property must be paid to the Tax Office.

Furthermore, local financing institutions typically require that the borrowing company executes a promissory note, which is a form of security that is invested by the prerogatives provided for by Article 545 of the Dominican Civil Procedural Code, and it will be considered a title of enforcement, without the need for a court ruling, in the case of the debtor's default. The promissory note has very specific and mandatory rules as to the form of the document, and must be made by a local notary public. Among the requirements of the promissory note are: it must be in Spanish, validated and executed by the borrower in the presence of a public notary, and high tax and stamp (approximately 0.007 per cent of the total amount of the loan, which includes principal and interests) and recording fees apply.

Regarding debt finance, since the acquirers are mainly foreign, the bonds and other forms of securities are rarely placed in the Dominican Republic. If, however, a public offer is made in the Dominican Republic, then Dominican law, as per the terms of Securities Law No. 19-00, will govern it.

With regards to private equity, it is a financing method that is growing steadily, from both sides, local and foreign.

Finally, considering how volatile the local currency is, foreign currency, mainly the US dollar, is used for any the financing options.

VII EMPLOYMENT LAW

Employment is governed by the Labour Code, which was enacted on 29 May 1992.

The relevant matters to consider in a merger transaction, with regards to employees, are: labour contingency (severance); acquired rights; and joint liability.

Dominican laws are very protective of employees' rights and the lawfully provided severance payment derived from the unilateral decision of the employer to terminate the labour contract can be quite high. Because of this, in some mergers the labour contingency at the time of the merger is deducted from the price.

In accordance with Articles 76, 79, 80, 184, 203, 221 and 223 of the Labour Code, the severance pay and other benefits to be paid to an employee upon liquidation (when the employer unilaterally terminates the contract without justified cause) comprise:

a advance notice: This is the notice of termination of the contract. The days in advance in which the employee must be notified of the termination of his or her contract will vary depending on the length of time that the employee has worked for the company. If this period is one year or more of continuous work, the advance notice will be of 28 days. If the company fails to give this advance notice, then it must pay the employee 28 days' salary;

b severance: the payment of an amount equal to 21 days' salary for each year of service given;

c any outstanding wages;

d vacations, if the workers have not taken their vacation during the last year;

e a proportion of the Christmas salary, depending on the date of the termination; and

f a portion of the company's profits in the last year, if applicable.

The severance amount to be paid, and any other benefits related to it, are made proportionally to the amount of time worked by the employer in the company, which means that until the labour contract is terminated, and the workers are paid, the amount to be paid in connection with severance and employees' acquired rights will increase over time.

On the other hand, acquired rights of the employees are those benefits given to the employee in addition to those lawfully provided, for example, life insurance policies, payment of gas, funeral expenses, etc. Any modification or elimination of the acquired rights of the employees constitutes a breach in the terms of the labour contract, which entitles the employee to a dismissal with just cause, and triggers the severance compensation indicated above.

Lastly, the third scenario (joint liability) refers to the shared responsibility that is created when a company, a branch or an agency thereof is transferred or assigned, or employees are transferred to other companies,[3] including those rights and obligations of the employee that have been the subject of a lawsuit and are pending verdict, and in no case will void the acquired rights of the employees, whereby the new employer is jointly liable with the substituted employer for all the obligations resulting from the labour contracts or the law, before the date of substitution.

In that vein, in an acquisition by share transfer, all the employees' acquired rights must be preserved because the company continues its operation without there being any change in terms of employment. Likewise, in a merger by absorption the surviving entity assumes all the labour liabilities of the company that ceases to exist; if a new company is created, it assumes the liabilities of the companies that cease to exist.

In an asset purchase acquisition were there is no transfer of employees, in principle there are no labour liabilities to consider. However, if an employee transfer takes place, or a company sells all its assets to another company and the first one terminates the labour employment with the employees who are then hired by the company that purchased the assets in a period of less than two months, it can be presumed that the seniority of the employee continues in the labour contract with the buying company, and as such the employee will have the legal remedies to oblige the companies to comply with Dominican laws. Nonetheless, the severance payment paid by the company that sold the assets may be deducted from future severance payments made by the acquiring company to the employees.

VIII TAX LAW

The fiscal impact of a merger is covered mainly by the Tax Code, the Ruling for the application of Title II of Income Tax enacted by Decree No. 139-98, and Decree 408-10 of Business Reorganisation.

Prior to going through the merger process, and as per the terms of Article 94 of Decree 408-10 of Business Reorganisation, it is mandatory to inform the Tax Office of the intention of merging and request their approval to proceed with the merger.

Mergers, as stated on the three legal texts cited above, are considered a form of reorganisation of companies, and as such the results that could arise as a consequence of the reorganisation are not taxed, and the rights and fiscal obligations that correspond to the entities that are reorganised will be transferred to the continuing entities.

Notwithstanding, Article 287, Paragraph III of the Tax Code estates that the losses that come from other entities, as a result from a reorganisation process are not tax deductible.

---

3 Which occurs for example when the employees of the company that ceases to exist work for the surviving or new entity created.

Also, it is important to point out that the surviving entity in a merger, or the new entity created as a result of the merger, is liable for the obligations and taxes owed by its predecessor prior to the merger, is liable for the penalties for the infringements of the companies that have ceased to exist, and cannot oblige another entity to assume them.

On the other hand, acquisitions either by share transfer or by asset purchase are taxable transactions, with consequences for both parties (buyer and seller).

If a company decided to purchase the assets of an entity, in order to avoid acquiring the liabilities, it would have to pay the corresponding taxes for all of the assets, and the tax rate to be applied for the transfer would depend on the type of asset that is being transferred. The tax on transfer of real state property is of 3 per cent of the sale price of each property or of the value of the property registered in the records of the Tax Office, whichever is higher. The same principle applies to the transfer of the vehicles, but the tax rate is of 2 per cent. In both scenarios the tax described relies on the buyer.

For the seller, the corresponding taxes that arise out of the transaction are paid on the yearly income tax, and will be the difference between the acquisition price (adjusted by inflation) and the sale price. For the year 2014 the tax rate is of 28 per cent.

Also, the purchase price should include the 18 per cent VAT for the sale of assets (other than real state) that must be reported, collected and paid by the seller.

With regards to the transfer of shares, the seller is the one who bears the tax burden. In accordance with Article 289 of the Tax Code, the earning of capital tax, which is of 28 per cent for the year 2014, applies to sales, swaps and other allocation acts of capital assets, such as share transfer, in which the applicable tax is calculated by deducting the price or the value of the transfer of the shares, the cost of its acquisition, and the inflation adjustment.

Moreover, Norm 2-2010 issued by the Tax Office sets the formula used by the Tax Office to verify if a capital gain is computed. Notwithstanding this, the Tax Office can estimate the market value or price of the shares, regardless of the price that the parties agree to in the sales agreement, and it takes into consideration the whole patrimony of the company (its assets, liabilities, reserves, accumulated earnings or dividends not yet distributed, paid in and subscribed capital, among others), evaluated in accordance with what has been declared by the company on its annual tax declarations, divided by the amount of shares that are paid in at the moment, plus the nominal value of said shares, determining in this way the market value or prices of them. With this reasoning, the Tax Office determines if there has been a capital gain or loss.

Also, Norm No. 7-2011 issued by the Tax Office requires that any company that acquires shares withholds 1 per cent of the price paid to the seller for the purchase of the shares regardless of whether the seller is an individual, legal entity, resident or foreign national. Said payment is credited to the tax on capital earning that has to be paid by the seller, generated in occasion of the sale, if applicable.

IX COMPETITION LAW

On 16 January 2008, the Domincan Republic enacted Law No. 42-08 on the Defence of Competition. Said law prohibits the abuse of a dominant position and disloyal acts such as agreements between competitors' market players, and promotes free competition.

However, said law does not regulate the concentration of capitals between the different players of a market.

Notwithstanding the above, several regulated markets require the authorisation of certain government dependencies, such as:

a Telecommunications: Law No. 153-98 along with the Rules of Free and Loyal Competition of the Telecommunications market require that any transfer, assignment, lease or grant of the right to use any title or lien granted on concessions or licences must be carried out with the previous authorisation of Indotel (Dominican Institute of Telecommunications). In that vein, the sale or assignment of shares or shares resulting in the loss, by the seller or transferor of social control, will require the authorisation of Indotel (Dominican Institute of Telecommunications). Furthermore, mergers and market concentration in telecommunications are expressly subject to the previous approval of Indotel, and the institution can challenge the transaction or request and instruct correction measures in order for the transaction to be within the boundaries of the Law and the Rules.

b Banking: Monetary and Financial Law No. 183-02 requires that the previous authorisation from the Monetary Board is acquired, as per Articles 9 and 35 of said law, in cases of mergers, share transfer of 30 per cent or more of the paid-in capital, absorption, substantial asset and liabilities transfer of any financial intermediation entity. The previous authorisation from the Monetary Board is also required for currency exchange institutions.

c Securities: as per the terms of Articles 386 and 157 of the Companies Law, a corporation that had ventured in the securities market must submit the merger agreement to the Securities Superintendency, and said entity will accept or reject the project within a 15-days period. Also, the merger agreement is submitted to the approval of the bondholders' meeting, unless the companies involved allow that the bondholders can be offer a refund, at its sole requirement. Moreover, Article 46 of the Securities Law No. 19-00 states that the National Securities Council will establish a maximum participation percentage within the capital of a stock exchange that can be owned by a securities brokerage entity, in order to avoid concentration.

d Insurance: Articles 174-184 of the Dominican Insurance and Bonds Law No. 146-02 allows insurance and reinsurance companies to merge between each other, with the previous authorisation of the Dominican Insurance Superintendency. Also, the Dominican Insurance Superintendency can recommend that an insurance company merges, if the financial statements or the verifications made by the Superintendency reflect that the insurance company is not in a position to guarantee the fulfilment of its obligations before the insurers.

e Electricity: Paragraph II of Article 12 of the Ruling for the Application of the Electricity General Law No. 125-01, enacted by Decree No. 555-02 states that the Electricity Superintendency, before authorising the transfer of generation concessions, mergers or sale of shares where generation companies are involved, must investigate whether the petitioners, either by themselves or through related parties are owners of generation centres with a total capacity that represents, in its opinion, a significant percentage of the maximum demand of the National

Electric System Interconnected that, in accordance with the criteria established by the National Commission of Energy, constitutes a threat to free competition in the electric wholesale market. Article 82 of the law establishes a similar prohibition on the transfer of concessions of generation and distribution.

f Pension Funds: Article 93 of Law No. 87-01 of Social Security, and Article 50 of Decree No. 969-02 that establishes the Pension Ruling, require that the merger is approved by the Pension Superintendency before completing matters of common law, and in that sense, an assembly approving a merger project together with the merger plan must be submitted. The Superintendency can require amendments to the merger project, or reject it.

g Health Risk Administrators: similarly to pension funds described above, Article 153 of Law No. 87-01 of Social Security states that health risk administrators and the National Health Insurance must obtain the express authorisation of the Health and Labour Risks Superintendency before merging with another entity.

X OUTLOOK

There are significant modifications to the Labour Code, Civil Code and securities laws being discussed, which could affect certain aspects of mergers and acquisitions.

Also there is a law on restructuring currently being debated in Congress. However, it is unknown when these modifications to the existing laws and the enactment of new ones will be approved by Congress, considering that some bills have been submitted for years.

Appendix 1

ABOUT THE AUTHORS

MARÍA ESTHER FERNÁNDEZ A DE POU

Russin, Vecchi & Heredia Bonetti

María Esther Fernández A de Pou is a partner at Russin, Vecchi & Heredia Bonetti. She provides specialised consulting services to private-sector clients in the different branches of aeronautic and maritime law, corporate (mergers and acquisitions), foreign investment, tax, finance structuring and international trade domains, as well as concessions, privatisations, agreements and real estate law. She currently represents several multinational companies in their business ventures in the Dominican Republic, with a comprehensive legal assistance for couriers' giants, airlines, airports, maritime companies, real estate developers, foreign banks, insurers, investments funds, universities and pharmaceutical companies, among others.

MÓNICA VILLAFAÑA AQUINO

Russin, Vecchi & Heredia Bonetti

Mónica Villafaña Aquino is a senior associate at Russin, Vecchi & Heredia Bonetti. She has a broad and general practice in general business, corporate law and international transactions. She has represented several multinational companies in corporate reorganisation processes such as mergers, spin-offs, acquisitions, dissolutions, corporate restructuring, tax planning, contributions in kind, transfer of shares, transfer of assets, incorporation and registration of non-profit organisations, etc.

LAURA FERNÁNDEZ-PEIX PEREZ

Russin, Vecchi & Heredia Bonetti

Laura Fernández-Peix Perez is an associate at Russin, Vecchi & Heredia Bonetti. She provides legal assistance and consulting to firms and investment projects in all matters relating to their legal needs, specifically in areas related to commercial law, corporate law, contracts and real estate. She has participated in several mergers and acquisitions, drafting the corporate documentation approving the mergers, and has drafted and revised contracts relating to the acquisition of part of a company and the exit of several of the majority shareholders.

RUSSIN, VECCHI & HEREDIA BONETTI
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
info@rvhb.com
mefernandez@rvhb.com
mvillafana@rvhb.com
lfernandez@rvhb.com
www.rvhb.com