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July 12, 2011

**FRANCISCO FERNÁNDEZ ROSTELLO
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360 MADISON AVENUE, 16TH FLOOR
NEW YORK, NEW YORK 10017**

Re: Memo on enforceability of netting provisions under ISDA Master Agreements in the Dominican Republic.-

Dear Francisco,

This memo has been prepared to address general legal issues regarding enforceability of the 1992 ISDA Master Agreement and the 2002 ISDA Master Agreement (collectively, the “ISDA Master Agreements”) in view of ISDA members’ interest to enter into derivatives transactions with counterparties located in the Dominican Republic. We will refer to the specific questions posed in your e-mail dated June 17, 2011.

Our responses will be divided as follows: **I-General considerations on bankruptcy regulations in the Dominican Republic; II- Enforceability issues of ISDA Agreements; III. Answer to specific queries.**

I-General considerations on bankruptcy regulations in the Dominican Republic.-

The provisions on bankruptcy in the Dominican Republic are contained in the Code of Commerce dated July 4, 1882 and Law 4,582 dated November 14, 1956. Bankruptcy rules deal mainly with liquidation and do not contemplate reorganisation, although a debt restructuring can be agreed upon a preliminary hearing before the Chamber of Commerce. There are few bankruptcy cases, and these traditionally end at the conciliation stage.

The Dominican Republic is looking forward to modernize and update its insolvency and bankruptcy legislation. A bill, which includes provisions to permit corporate reorganizations has been submitted to congressional





approval, but due to Congress' failure to act, expired and will therefore have to be reintroduced in another legislature.

There is no organised insolvency for entities other than merchants or business organizations and there is no system of debtor relief or protection against over indebtedness. However, there are special insolvency rules applicable to financial institutions, which involve intervention by the Banking Superintendence and a special fund to support a bank in the interest of its depositors, pursuant to the Law 183-02, the Monetary and Financial Law. There are also special rules for companies in the business of distributing electric power, insurance companies, and pension funds. There are no rules governing the insolvency of State-owned enterprises. If a debtor has sufficient assets to satisfy outstanding claims, a voluntary out-of-court liquidation is often considered.

A debtor is compelled to file its bankruptcy within 3 days following a general cessation of payments. Failure to do so may give rise to criminal prosecution and subject the officers and directors of the bankrupt company to imprisonment (from 15 days to 1 year). A mandatory conciliation proceeding governed by Law No. 4,582 must take place before the Chamber of Commerce upon request of unsecured creditors or the debtor. Most attempted bankruptcy proceedings are settled at this stage and rarely do proceedings escalate to the litigation stage. Should the compulsory conciliation procedure be unsuccessful, unsecured creditors are authorized to bring the liquidation action through judicial proceedings.

Only the debtor and unsecured creditors of the debtor may initiate a bankruptcy or insolvency proceeding; secured creditors may commence said proceedings provided they surrender their rights to the collateral. The declaration of bankruptcy has no effect on secured creditors, except that interest payable under such secured claims may only be collected from the security interest granted for the benefit of such claim. Except for accruing interest, secured creditors may benefit from bankruptcy proceedings with respect to unsecured portions of their claims.

Bankruptcy procedures are brought before the Civil and Commercial Chamber of the Court of First Instance (there is no specialized jurisdiction for insolvency or bankruptcy proceedings in the Dominican Republic). The declaration of bankruptcy by the judge leads to the removal of the officers and directors of the debtor from the administration of the debtor's assets. All legal proceedings towards the enforcement of unsecured claims are stayed upon declaration of bankruptcy by a judge; interest on unsecured claims stops accruing and all indebtedness of the debtor is accelerated and becomes due and payable.

A provisional administrator is appointed by the judge and within a period of 15 days after the appointment of such provisional administrator, all known creditors must be gathered in order to discuss the appointment of up to 3 administrators. When required by representing one quarter of the registered debts, the administrators must post a bond set by court. The bond cannot be



greater than 30% of the total assets of the debtor as of the bankruptcy date or less than 15% thereof.

The administrator is required to make an inventory of all of the debtor's assets, including warehouses, desks, boxes, paper baskets, books, paper, and furniture, and to draft balances reflecting all of the debtors commercial operations, and the claims against its estate. The administrator is also required to collect accounts receivables, sell items subject to deterioration, and mortgage all real estate belonging to the bankrupt's debtors¹.

Distributions are made in accordance with the repayment plan established by the law or by the liquidation plan (for judicial bankruptcy proceedings) approved by the majority of creditors. Such distributions include solely unsecured claims, on a pro rata basis, except for subordinated claims (such as claims that derive from equity participations) and subordinated loans subject to the applicable subordination provisions.

Liquidation cases are formally concluded with the approval of the liquidation plan and distributions made to unsecured creditors on a pro rata basis. Only secured or privileged claims survive the conclusion of an insolvency procedure.

II- Enforceability issues of ISDA Agreements.-

We will now refer to the enforceability of the ISDA Agreements, specifically of those sections concerning: Termination, close-out netting and multibranch netting. We have assessed Section 5 and 6 which refer to: Events of Default Termination Events; and Early Termination and Close-Out Netting, respectively. Section 6 mainly foresees two stages for such early termination: 1) a close out, that entails termination of both parties early upon the occurrence of a default and further calculation of a close-out amount on each Transaction; and 2) the netting stage, dealing with rules for netting the loss/profit on each Transaction to have a single net sum due by one party or the other.

The latter provisions would be enforceable under Dominican law vis a vis Dominican counterparties. Some adjustments would have to be made under the relevant schedules, depending on the counterparty's nature so as to eliminate inapplicable provisions (i.e. language to adapt applicability of Tax Event provisions set under Section 5 b) when entering transactions with a local governmental entity; suppression of references to affiliates, corporate bodies and/or any corporate authorizations when contracting with said governmental entities).

¹ The obligations of the insolvency administration are contained on articles 468 and following of the Code of Commerce.

However, there could be certain limitations on enforceability of these provisions when the termination event and applicability of the latter rules for Early Termination is verified due to insolvency or bankruptcy procedures. According to the rules set forth in the Code of Commerce, upon entry of a bankruptcy order, the court must determine an “insolvency date”, which is the date the debtor ceased to make payments to its creditors. The insolvency date could be as early as a date prior to the initiation of the above referred amicable settlement process. If, for any reason, the court has not fixed such a date, the insolvency date will be deemed to be the date when the bankruptcy order was issued.

Certain transfers of property by the debtor are defined by the Code of Commerce as null and void and under this category the law includes any payments made by the debtor for obligations due and payable after the so called “cessation of payment period” or “suspect period” and prior to the judicial decision declaring bankruptcy, provided that creditors that receive such payments had knowledge of such cessation of payments. The voidable transactions may be attacked by any party with an interest, such as receivers or unsecured creditors participating in the proceedings. Nonetheless persons who benefited by the annulled payments will have a claim against the debtor and may participate in the bankruptcy proceedings so as to receive a valid payment on a pro rata basis.

Since the creditors under the ISDA Agreements will be considered as unsecured creditors (unless stated otherwise in the applicable schedules), where a bankruptcy is verified, netting and early termination payments would be stayed and would have to be made subject to the applicable rules of bankruptcy in the Dominican Republic (please see Section I when referring to such rules).

III. Answer to specific queries.

a). Assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in the Dominican Republic, are the provisions of the ISDA Master Agreements permitting the Non-defaulting Party to terminate all the Transactions upon the insolvency of its counterparty enforceable under the law of the Dominican Republic?

Termination of all the Transactions upon an insolvency or bankruptcy event would be valid and thus, enforceable under the laws of the Dominican Republic. However, as stated above, payments to unsecured creditors (as it would be the case of ISDA creditors, unless specified otherwise under the relevant schedules) would be stayed and would have to follow the rules set for bankruptcy (distribution on a pro rata basis made by the bankruptcy’s administrator).

It is important to emphasize that the bankruptcy declaration has no effect for secured creditors of the debtor, except that interest payable under such secured claims may only be collected from the

security interest granted for the benefit of such claim. Secured creditors may benefit from bankruptcy proceedings with respect to unsecured portions of their claims.

b). Assuming the parties have selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in the Dominican Republic, are the provisions of the ISDA Master Agreements automatically terminating all the Transactions upon the insolvency of counterparty enforceable under the law of the Dominican Republic?

Rules concerning selection of Automatic Early Termination upon certain insolvency events, as listed under Section 5 a) (vii) of the ISDA Master Agreements would be deemed enforceable under the laws of the Dominican Republic. However, netting provisions and Payment Date rules would not be enforceable in such scenario, since, as earlier explained, payments to creditors would be stayed and further made upon a pro rata distribution by the appointed bankruptcy administrator.

As for Set-Off rules (Section 6, letter f), we are of opinion that they would remain applicable even in the case of an Early Termination due to a bankruptcy event, given that, set-off of due claims are permissible during bankruptcy proceedings. A set-off made with respect to claims not yet due by the debtor may be subject to invalidation upon a bankruptcy procedure.

There are no provisions regarding the effects of insolvency proceedings on subsidiaries or affiliates of the debtor. Also, there are no provisions on inter-company or affiliate claims. Accordingly, insolvency procedures of subsidiaries and affiliates would be treated as separate procedures (i.e., there are no provisions regarding substantive consolidation or joint administration of related bankruptcy proceedings).

c.) Are the provisions of the ISDA Master Agreements providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of counterparty enforceable under the law of the Dominican Republic?

The agreement to pay a single lump-sum termination amount would be considered valid; however, payment of such would be stayed should a declaration of bankruptcy have taken place, in which case, the amount to be paid would depend on the pro rata basis distribution made by the bankruptcy administrator.

As mentioned above, special insolvency rules apply to financial institutions. But, even when the debtor is a financial entity, Law N° 183-02 foresees that upon the declaration of dissolution of a financial intermediation entity by the Monetary Board, all creditors' rights will be automatically suspended. Accordingly, any payments made would be deemed as null².

² Article 63 of Law N° 183-02.

The General Law of Electricity N° 125-01 (“Law N° 125-01”), enacted on July 26, 2001 purports, when dealing with applicable rules to distribution power companies declared in bankruptcy, that rights and assets related to the same will be submitted to a public bidding process. Sums obtained from such public bidding processes will be aimed at paying outstanding debts and financial obligations derived from the power concession with higher priority, and if a credit balance is verified, would be submitted to local law rules for its distribution. Moreover, Law expressly states that “*Creditors could not object by any reason such public bidding process*”³.

We hope the above information responds to your inquiries. Please do not hesitate to contact us should you require any additional information or clarification regarding this matter.

Sincerely,



Mary Fernández Rodríguez



Carolina Silié

³Article 64 of Law 125-01.