

## MEMORANDUM

To: Frederick O. Quenzer, Katherine Darras  
**International Swaps and Derivatives Association, Inc. (ISDA)**

From: **Headrick Rizik Alvarez & Fernández**

Date: September 2, 2016

Re: **Questionnaire - OTC Transaction Contract Enforceability & Netting**

---

To whom it may concern:

This memorandum has been drafted pursuant to your request that we complete the Questionnaire on **High Level Advice Regarding OTC Transaction Contract Enforceability and Netting** for the Dominican Republic (the “Questionnaire”).

For the purposes of completing the Questionnaire, we have proceeded to copy the full text of the questionnaire and inserted our answers (in blue).

The opinion and considerations expressed herein are subject to the following qualification: we are licensed to practice law in the Dominican Republic. Consequently, our views and opinions are limited to the laws of the Dominican Republic, and we are expressing no opinion as to the effect of the laws of any other jurisdiction.

We assume no obligation to update or supplement this memorandum to reflect any facts or circumstances which may hereinafter come to our attention or any change in the laws, rules, regulations or court decisions which may hereinafter occur.

### **LIST OF QUESTIONS FOR HIGH LEVEL ADVICE REGARDING OTC TRANSACTION CONTRACT ENFORCEABILITY AND NETTING:**

- 1) *Do OTC derivatives transactions face an enforceability problem (e.g. due to anti-wagering provisions etc. under local law)?*

Generally not; as a general rule both natural persons and entities (public and private) have the right and authority to enter into commercial agreements. However, certain provisions of such commercial

[00586031.DOC;1]

agreements (such as netting and set-off provisions) may not be enforceable due to the application of certain legal provisions governing insolvency and bankruptcy proceedings, as detailed under question 3) below.

- 2) ***Are there any issues with foreign law governed contracts (mainly English and New York law) when used for cross-border transactions into your jurisdiction? For example, some countries may restrict the use of foreign law and language documents when it comes to contracting with local public law or state entities.***

From the perspective of Dominican Law, the choice of foreign law to govern an agreement is generally valid and binding. This was recently affirmed by Law 544-14 on Private International Law in the Dominican Republic, dated December 5, 2014, which specifically provides that contracts are governed by the agreed law between the contracting parties. Should one of the parties (in spite of having submitted to the exclusive jurisdiction of the U.S. courts) file a claim in the Dominican Republic, the court before which suit is brought may, pursuant to international public policy grounds, apply the *lex fori*, i.e., Dominican law, rather than the law chosen by the parties. To such effect, Law 544-14 requires the Court to consider the connection between the legal or judicial situation at hand (i.e. the matter of the dispute) and Dominican public order. However, in practice courts of the Dominican Republic generally honor the provisions of an agreement that are to be governed by and construed in accordance with foreign law.

Specifically regarding contracting with the State, Article 220 of the Constitution provides that agreements entered by foreign parties domiciled in the Dominican Republic with the State must include an explicit submission to the laws and jurisdiction of the Dominican Republic. The intent of this provision, and its application in practice, has yet to be interpreted by local jurisprudence. In any case, the aforementioned constitutional provision would likely pose no restriction to having the agreement be subject to foreign law, provided the counterparty is not a resident of or domiciled in the Dominican Republic.

- 3) ***Are there provisions (of a statutory, customary, common law etc. nature) in local law that provide for the enforceability of close-out netting? Is close-out netting defined in addition to set-off under local law? Does local law allow netting in accordance with the terms of the underlying contract (e.g. the ISDA Master Agreement)?***

No; there are no provisions which specifically provide for the enforceability of close-out netting. Set-off rights are expressly set forth in Articles 1289 *et. seq.* of the Dominican Civil Code. However, there are no legal provisions which define or otherwise distinguish close-out netting from set-off.

In summary, while we believe that the terms of the underlying contract as well as the provisions concerning automatic termination are enforceable and will be effective, netting and set-off provisions that may be triggered thereby, may not be enforceable and any amounts that are set off may be subject to clawback due to the application of the suspect period rules as well as the rules prohibiting transfers “without value” on a post-bankruptcy basis (it is unlikely that judges would look to pre-bankruptcy consideration for a post-bankruptcy transfer; only simultaneous exchanges are permitted).

The aforementioned limitations are based on our interpretation of the legal provisions governing insolvency and bankruptcy proceedings. The legal provisions on bankruptcy and insolvency proceedings in the Dominican Republic currently in force are contained in the Dominican Code of Commerce and Law No. 4582 of 1956 on Bankruptcy Declarations.

In accordance with these provisions, certain transfers of property by the debtor (including transfers authorized to take place by the debtor and which are carried out by netting) are null and void. Such transfers include any payments made by the debtor for obligations due and payable after the “suspect period” and prior to the judicial decision declaring bankruptcy, provided that creditors that receive such payments had knowledge of the debtor’s cessation of payments. 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. Consequently, where a bankruptcy is verified, netting and early termination payments may be stayed and would have to be made subject to the applicable rules of bankruptcy in the Dominican Republic.

With regards to the suspect period, the Code of Commerce provides that 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. 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. The “suspect period” commences on the date that is 10 calendar days prior to the insolvency date.

Please note that on August 7, 2015, a new law on Restructuring and Liquidation of Companies and Business Persons (“Law No. 141-15”) was approved, which will enter into effect as of **February 7, 2017**. Law No. 141-15 expressly provides for the right of set-off and the inclusion of alternative payment proposals in the restructuring plan. However, it provides that the terms must be agreed prior to the initiation of the conciliation and negotiation process.

Law No. 141-15 applies to national or foreign companies and business persons domiciled or with a continuous presence in the Dominican Republic, and excludes: commercial entities controlled by the State; financial intermediation entities (including commercial banks) regulated by Monetary and Financial Law No. 183-02; insurance companies, regulated by the Insurance and Bonds Act of 2002; securities intermediaries, investment fund management companies, centralized security deposits, stock exchanges, securitization companies and any other entity considered to be a stock market participant, with the exception of publicly traded companies and companies governed by Law No. 19-00 on Securities Market dated May 2000. Special rules apply to companies participating in the electric sector are also excluded.

Law 141-15 also provides mechanisms for the participation by interested parties in the restructuring process. In that sense, during the review of the restructuring request and for as long as the restructuring process is in course, the creditors have the right to appoint the “Creditors’ Advisor”, a physical or legal person to assume their collective representation during the procedures and actions provided for in the Law. The creditors of securities of the Debtor issued in a public offering can also appoint a representative denominated the “Representative of Publicly Issued Securities”. Likewise, the employees of the Debtor may also appoint a person who will act in the capacity of advisor for the employees (the “Employees’ Advisor”). Advisors represent the collective interests of the respective interested groups with priority over other interested parties during the restructuring process. However, in cases where Advisors are not appointed, or are appointed and then removed, their duties and obligations will correspond to the Creditors and/or Employees.

In assessing the enforceability of terms which provide for close-out netting or set off, it is particularly important to take into consideration provisions of Law No. 141-15 regarding the suspect period and the possibility of annulment of certain transactions. In this regard, Law No. 141-15 provides for the possibility of requesting annulment of transactions made within a period commencing two (2) years prior

to the date of filing of the reorganisation request, if the Court considers them an unjustified diversion of assets or as detrimental to creditors.

Pursuant to Law No. 141-15, the following transactions are considered null and void: transfers of assets free of charge or at a price below market value; when the value of the intended consideration is inferior to that of the obligation performed, or vice versa; granting of collateral or the increase in value of such secured interest without reasonable consideration; repayment of obligations that are not yet due; transfers of property in favor of creditors resulting in the payment of an amount higher than that which the creditor would have received as a result of the liquidation; transactions with related entities or companies where the debtor or any of the creditors serves as an administrator or is a member of the administrating corporate body, represents (whether jointly or separately) at least fifty one (51%) per cent of the paid-in capital of such entity, has control over decisions made by the shareholders' or is in a position which allows them to appoint the majority of the members of the governing body; among others. Additionally, when the debtor is a natural person, transactions with the debtor's spouse or partner, persons with whom the debtor has procreated, their descendants, ascendants and certain relatives, among others, are considered null and void.

**4) *In case there are netting provisions under local law, do they apply to all types of counterparties, e.g. financial institutions, corporates (commodity trading firms, utilities, manufacturers etc.), SPV, public law entities (municipalities, central bank, development banks etc.)?***

As provided in our response to question 3) above, local laws do not specifically provide for netting.

With regards to bankruptcy and insolvency proceedings, please note that special rules may apply depending on the type of counterparty. In addition to special rules which apply to public law entities, we may cite the following examples:

- Financial Intermediation Entities

The insolvency of banks and other financial intermediation entities (*entidades de intermediación financiera*) is governed by the Monetary and Financial Law No. 183-02, which establishes a purely administrative process in charge of the Banking Superintendency, under the supervision of the Monetary Board.

- Insurance and Reinsurance Companies

Insurance and reinsurance companies, on the other hand, are subject to special provision concerning insolvency set forth in the Insurance and Bonds Act of 2002, which provides for the revocation of the charter to act as insurer or reinsurer in the event it becomes unable to meet its obligations to policyholders.

- Pension Funds

On the other hand, pensions funds will be subject to the provisions of Law No. 87 of 2001 which creates the Dominican Social Security System, pursuant to which in the event of insolvency of a pension fund, the Superintendency of Pensions is required to intervene in the affairs of the fund for the purposes of negotiating the transfer of pensioners' rights in the insolvent fund into one or several other funds.

- 5) *Is the scope of transactions eligible restricted in any way, e.g. to certain products (rates, currencies, equities, credit etc.)? What about commodity products (gas, coal, oil, metals, agricultural etc.) and “new” products (emissions allowances, freight rates, weather variables etc.)? Is there a different treatment for financially settled transactions as opposed to physically settled ones (i.e. where the underlying product is delivered)?*

We have not identified any limitations or restrictions on the scope of the transactions eligible, or any restrictions based on the nature of the product.

With regards to physically settled transactions, please note that the import and/or distribution of certain products such as petroleum, precious metals and certain agricultural commodities, are subject to regulation. Therefore, physical settlement needs to be considered prior to entering into such agreement.

- 6) *Are financial collateral arrangements governed by foreign law recognized under local law? In particular, would title transfer and security interest arrangements (under English and NY law) be enforceable (e.g. ISDA credit support documentation)?*

To the extent that a collateral agreement entails the creation of a security interest in collateral located or held in the Dominican Republic, the laws of the Dominican Republic would govern the perfection of such security interest. As a result of the foregoing, separate agreements would most likely be required.

Perfection of a security interest under Dominican law typically takes place with a special notice or recording and fulfillment of formal requirements in the appropriate security documents. Such requirements will vary, as the types of security interests available under Dominican laws are governed by different legal provisions. Below we will refer to the most common security interests under local law.

When the collateral consists of movable assets or personal property, the most common type of security interest is the non-possessory pledge, similar to the chattel mortgage and originally intended for crops and agricultural equipment but later expanded to cover virtually all sorts of movable assets, including industrial machinery and motor vehicles. For purposes of perfection of this security, the law provides a requirement of specificity, which means that the assets subject to the security interest must be identified as concretely as possible. The agreement embodying the chattel mortgage must be signed in the presence of a notary public or Justice of the Peace and placed on record at the office of the Justice of the Peace of the debtor’s domicile, except that in the case of motor vehicles, the document must be recorded before the Tax Department. Recordation fees are nominal.

Pledges over other types of moveable assets are governed by the provisions set forth in Articles 91 et. seq. of the Code of Commerce, which govern the commercial pledge. In this sense, a commercial pledge shall constitute the security for purposes of a pledge over contractual rights, shares, deposits in local banking accounts, and other intangible assets. Additionally, and depending on the particular type of asset, additional requirements towards the creation and perfection of the security interest shall need to be fulfilled, usually: (i) a notice to a third party under Article 2075 of the Civil Code, as would be required for purposes of perfecting a pledge over deposits maintained in local banks, and over contractual rights; (ii) special recordings in the share registry books, or endorsements, in the case of pledges over stock; or (iii) special filings before government offices, depending on the type of asset (e.g. naval vessels or aircrafts).

Finally, and with regards to the taking of a security interest over real estate property, the principal type of security for such purposes would be a mortgage. Mortgages are governed by the general provisions set forth in articles 2114 *et. seq.* of the Civil Code and by the Real Property Registration Law No. 108-05 of 2005. The mortgage agreement must be signed in the presence of a notary public authorized to act in the judicial department where the real estate property is located, and be registered before the Title Registry with jurisdiction over the mortgaged property. Recordation of the mortgage entails payment of a tax in the amount of two percent (2%) based on the secured amount.

7) ***Any other issues under local law (e.g. conflict of law rules; jurisdiction issues (e.g. arbitration recommended)?***

- **Enforceability Considerations**

Dominican law does not require that commercial contracts be notarized, filed, recorded, registered or enrolled in any court, public office or authority in Dominican Republic or that any stamp, registration or similar tax or charge be paid in Dominican Republic to ensure their validity, enforceability or admissibility in evidence. Nonetheless, it is common practice for agreements executed within the Dominican Republic that the signatures be certified by a Notary Public.

A Spanish translation will be required in the event that the agreement is executed in English or any other language other than Spanish. Should the accuracy or validity of the translation in any local proceedings, a translation by a judicial interpreter could be required. For such purposes, the contesting party would need to plead the alleged discrepancies and request that a translation of the portions in discrepancy be translated by a judicial interpreter.

On another note, any document executed abroad, whether in Spanish or in any other language, will have to be legalized by the corresponding Dominican Consulate or by Apostille in accordance with the terms of the Hague Convention on Abolishing the Requirement for Legalization for Foreign Public Documents, so as to ensure the “proper legal form” should enforcement or presentation before a Dominican Court be required.

- **Exequatur Requirements**

In the event that a final court judgment be obtained in a foreign jurisdiction, such decision would be recognized, conclusive and enforceable in the Dominican Republic without retrial or re-examination on the merits of the case, so long as a writ of execution or “*exequatur*” authorizing the execution of the judgment has been obtained from the Court of First Instance for the National District in the Dominican Republic. Based on existing law, a local Court will issue the *exequatur* for the foreign-issued judgment **unless**: a) recognition of the judgment is on its face contrary to Dominican public order; b) the defendant failed to appear before the court and there is no evidence he or she was served notice in person or in his or her domicile; c) the judgment is irreconcilable with a decision previously issued in another country between the same parties, in a litigation that would have had the same subject matter and the same cause, when such a decision would have met the conditions necessary for its acknowledgement in the Dominican Republic; d) the subject matter of the judgment is not subject to the mandatory jurisdiction of the courts of the Dominican Republic; e) the judgment does not comply with all formalities required for the enforceability thereof under the laws of the country where the same was issued or fails to satisfy the authentication requirements under Dominican law.

- Transactions with Pension Funds

The financial instruments in which pension funds may invest are limited by the provisions of Article 97 of Law 87-01 which creates the Dominican Social Security System. Pursuant to the aforementioned legal provision, pension funds may only invest in the following instruments:

- Long term deposits and mortgage notes issued by banking institutions and other financial regulated entities.
- Debt instruments of private and public entities.
- Debt instruments and bonds issued or secured by foreign countries, central banks, foreign companies and banks, negotiated on a daily basis in international markets and that comply with the characteristics of the complimentary regulation.
- Notes and bonds issued by the *Banco Nacional de la Vivienda* for the development of the secondary mortgage market.
- Funds for the development of the housing sector.
- Any other instrument approved by the National Council of Social Security, prior analysis and recommendation by the Risk Classification Committee.

Consequently, unless authorized to do so by the National Council of Social Security, pension plans would not be allowed to enter into OTC transactions.

- Floating Security

The laws of the Dominican Republic do not provide for a floating security device to cover a rotating or fluctuating mass of goods or assets. On the contrary, local laws provide for a requirement of specificity, which means that the assets subject to the security interest must be identified as accurately as possible. The main issue with regards to the enforcement of a security interest when the secured amount is susceptible to variation derives from the fact that the security is recorded over a certain quantity of assets. Accordingly, this may require subsequent amendments to the original pledge agreement or otherwise, new pledge security documents, for the purposes of increasing the amount of assets originally granted as security. Moreover, it is necessary that the amount secured be fixed or subject to a fixed maximum amount (i.e. a ceiling amount).

- Waiver of the *Judicatum Solvi* Bond

Pursuant to Article 16 of the Dominican Civil Code and Articles 166 and 167 of the Dominican Civil Procedure Code, any foreign natural or juridical person without legal domicile in the Dominican Republic that is acting as a plaintiff or joining party in any litigation matter may be required to present the *judicatum solvi* bond, consisting of the obligation to post security to cover attorneys' fees and court costs incurred by the defendant, as well as any damages for wrongful prosecution, in case the latter is successful. Although this requirement no longer applies in connection with specific litigation matters, or to foreign parties domiciled or residing in the Dominican Republic, it is still recommended to include a waiver to this litigation payment for the benefit of foreign parties not domiciled in the Dominican Republic, or their potential assigns and successors.

- 8) ***Does local law/language standard documentation (sometimes referred to as “local ISDA agreement”) exist or do market participants use bespoke documentation for domestic transactions (as opposed to cross-border transactions)? Does a local repo document or GMRA annex exist?***

To the best of our knowledge, no local law/language standard documentation exists, and market participants generally utilize the ISDA Master Agreement, with choice of law provisions opting for the application of New York or English law. Likewise, no local GMRA annex exists.

- 9) ***Any other observation specific to the local regime that should be added? For example, are there any efforts under way locally to develop a national bank resolution regime for local banks that are considered systemically important, e.g., in the wake of global FSB guidelines on the efficient resolution of financial institutions)?***

Securities transactions and investment services in the Dominican Republic are governed by Law No. 19-00 on the Securities Market, dated May 8<sup>th</sup>, 2000. In this regard, it is noteworthy to mention that there is a proposed amendment Law 19-00 which has been in discussion for over a year, and would introduce significant reforms to the Dominican securities market. Among other provisions, proposed amendments contain provisions that would regulate OTC derivatives. However, at present date we cannot provide a definitive preview of the changes expected under this reformed legislation, should such changes take place.