The Real Estate Law Review: Dominican Republic

Fabio J Guzmán-Ariza and Alfredo Guzmán Saladín
Guzmán Ariza
23 February 2022

Introduction to the legal framework

i Ownership of real estate

Under Dominican law, there are several types of ownerships of real estate. The most common is absolute property, similar to the common law concept of freehold, which grants the titleholders, according to Article 51 of the Constitution, the right to enjoy, make use of and dispose of their properties.

Other types of ownerships of real estate recognised under Dominican law are as follows:

a. co-ownership under Condominium Law 5038 of 1958, by which two or more co-owners share the ownership of a residential or commercial property or both, each enjoying full rights over their own units and shared rights over common areas; and
b. indivision, whereby several co-owners jointly exercise the same right of full ownership over the same property considered as a whole.

Dominican law recognises other types of rights over real estate, such as usufruct, which grants the holder the legal right to use and benefit from property owned by a third party; 'use' or 'habitation', which grants the holder the right to use or live in a property owned by a third party; easements, by which a property is subject to a specified use or enjoyment by another, including the one that grants the owner of an enclosed property without access to a public road the right to transit through an adjoining property; and administrative concessions granted by the government over public land that cannot be privately owned, such as the subsoil, coastline and riverside areas.

ii System of registration

Since 1920, the Dominican Republic has employed the Torrens system for real estate registration purposes. This system was developed in Australia in the nineteenth century and is now widely used in many countries. In the Torrens title system, a register of land holdings is maintained by the government, which guarantees an indefeasible title to the properties included in the register. Land ownership is transferred through registration of title instead of using deeds. The registrar has a duty to ensure that only legally valid changes are made to the register. Any interest affecting or limiting the ownership rights of the registered owner, such as mortgages, easements and liens, must also be registered. Interest in real estate (e.g., property, mortgages and privileges) is only valid and enforceable against third parties upon registration at the office where the register is located (called 'Registry of Titles' in the Dominican Republic). Once registered, the system guarantees title and priority on a first come, first served basis.

In the Torrens system, a third party, acting in good faith, can rely on the information in the land register as to the ownership of a property and the other rights and interests that may affect it. In a property purchase, the buyer is not required to look beyond the record in the register. In contrast, in the common law system a vendor cannot transfer to a purchaser a greater interest than he or she owns, and the seller's title is as good or as defective as the weakest link in the chain of title, which necessitates a chain-of-title investigation at the record office.

As in most jurisdictions under the Torrens system, there are still some parcels of land in the Dominican Republic that are unregistered. However, most properties in the country, and 100 per cent of commercial properties, closed-gated projects and condominiums, fall under the registered category. Unregistered property is governed by the French 'ministerial' system, in which deeds affecting real estate are filed at a specific register that only serves as a recorder of documents, without any type of guarantee.

iii Choice of law

The Dominican Civil Code and Law 544-14 regarding conflicts of law mandate that all matters concerning real estate in the Dominican Republic are subject only to local law and courts, no matter who owns the property (a Dominican or a foreign individual or entity) or the place where the contract was signed. This is a rule of public policy that cannot be amended or waived by the contracting parties. If a transaction involves properties from another jurisdiction as well, then the part of the transaction that refers to the Dominican real estate must be governed by Dominican law; hence, all closing documentation must be drafted, executed and enforced according to Dominican laws. Nevertheless, for estate purposes, Law 544-14 allows foreigners to have their national law determine the rules of inheritance in connection with real estate located in the Dominican Republic; previously, Dominican inheritance rules applied in all cases.

Overview of real estate activity

During the present decade, the Dominican real estate market has been booming, along with the Dominican economy, which has grown at close to a 6.1 per cent clip, the highest in the Americas, in the years leading up to the covid-19 pandemic. During 2020, because of the covid-19 pandemic, as in most countries, GDP contracted by 6.7 per cent; however, during 2021, the country has seen a U-shaped recovery and, while the Dominican economy is diversified, the real estate and construction sector – posting a 42 per cent growth for the first half of 2021, compared to 2020 – has been a key contributor. BofA Securities (formerly Bank of America Merrill Lynch), an American investment bank, on a November 2021 Global Research report highlights that the Dominican Republic may be the best macro story in the entire Latam region, which forecasted a strong economic rebound of 13 per cent in 2021, making the country the fastest growing economy in the entire Latam region in 2021. Despite the pandemic, investment in the real estate market is very active, including in the hotel sector.

The real estate finance market has continued to improve because of the lowering of interest rates by the Central Bank, which has been pumping liquidity into the financial system because of the pandemic, as well as the government's timely efforts to reach covid-19 vaccination of at least 70 per cent of the country's population before the first half of 2021. Furthermore, owing in part to the pandemic's city shutdown, the second-home vacation property sector has seen a significant growth from the second quarter of 2020 to date, which has been fuelled by both domestic and international buyers. The Santo Domingo and the Punta Cana areas are still the main focus of real estate and financing activities. However, after the announcement by the new Abinader administration, in place since 16 August 2020, of new roads and other infrastructure projects, the Puerto Plata, Las Terrenas, Miches and Pedernales areas have attracted much interest from investors.

Foreign investment

The Constitution of the Dominican Republic lays out the fundamental framework for the organisation and the operation of the Dominican government and its institutions, and recognises an impressive list of civil rights for all individuals, Dominicans and non-Dominicans, including an equal protection clause for non-Dominican citizens and investors. Article 25 of the Constitution expressly states that foreign nationals are entitled to the same rights and duties in the Dominican Republic as Dominican nationals, except for the right to take part in political activities. Article 221 of the Constitution sets forth that the government will ensure equal treatment under the law for local and foreign investments.

Hence, there are no restrictions on foreign individuals or entities owning or leasing real estate in the Dominican Republic. The process for purchasing or leasing real estate for foreigners is exactly the same as for Dominicans. Foreign individuals and entities, and Dominicans, must register locally with the tax authorities before registering purchases of real estate. Individuals must submit their application directly at the Internal Revenue office, while entities must first register at the Chamber of Commerce and obtain a mercantile registry certificate, before applying for their tax number. These are mere formal requirements that can be easily fulfilled.

Furthermore, there are no exchange controls issues in investing in real estate in the Dominican Republic. Under current foreign investment laws, foreigners can freely repatriate capital and profits from their investment in the Dominican Republic.

Finally, several statutory incentive laws make it attractive for the foreign investor to purchase property in the Dominican Republic. For example, Law 158-01 on Tourism Incentives, as amended by Law 195-13, and its regulations, grants wide-ranging tax exemptions, for 15 years, to qualifying new tourist projects by local or international investors. The following projects and businesses qualify for these incentives:

a. hotels and resorts;
b. facilities for conventions, fairs, festivals, shows and concerts;
c. amusement parks, ecological parks and theme parks;
d. aquariums, restaurants, golf courses and sports facilities;
e. port infrastructure for tourism, such as recreational ports and seaports;
f. utility infrastructure for the tourist industry such as aqueducts, treatment plants, environmental cleaning, and garbage and solid waste removal;
g. businesses engaged in the promotion of cruises with local ports of call; and
h. small and medium-sized tourism-related businesses, such as shops or facilities for handicrafts, ornamental plants, tropical fish and endemic reptiles.

Structuring the investment

The most common entities used by foreign real estate investors in the Dominican Republic are local:

a. individual limited liability company (EIRL), an individually owned company; or
b. LLC (or SRL), with two or more shareholders.

Some, preoccupied by the complexities of reporting a foreign entity to the tax authorities in their home jurisdiction, prefer to register their domestic entity in the Dominican Republic.

There are no restrictions regarding the structure or legal form of foreign investment in real estate. If it is duly incorporated and recognised in the jurisdiction where it was formed, entities can do business in the Dominican Republic upon registration at the Chamber of Commerce and Internal Revenue.

As for Dominican entities, Dominican company law allows different types of commercial companies (EIRLs and LLCs) and corporations (regular or simplified stock corporations), all of which provide limited liability for its owners or shareholders. There are other investment entities recognised under the law, such as business partnerships, limited partnerships and per share limited partnerships, but they are seldom used because they do not offer full liability shields to their members, and are subject to the same tax treatment as the other entities. In 2011, Law 189-11 introduced local fiduciary vehicles as a holding option.

Dominican law does not recognise the concept of pass-through entities. Any entity, local or foreign, is subject to the same tax (27 per cent), regardless of its legal structure. There are two exceptions:

a. entities that have obtained exemptions under Tourism Incentive Law 158-01; and
b. closed-end real estate investment funds approved by the Dominican Republic Security and Exchange Superintendence.

Real estate ownership

i Planning

All planning, land use and change of use matters are handled by the municipalities where the real estate is located, the Ministry of Tourism (in tourist areas) and the Ministry of Environment. The municipalities and the Ministry of Tourism establish the general rules regarding use (e.g., residential, commercial, industrial, mixed, density and maximum height). Any construction or development that may affect the environment must also be approved by the Ministry of Environment.

The Maritime Zone, a strip of land all along the Dominican coastline measuring 60 metres from the high tide mark, is public property (Law 305 of 23 May 1968) and, as such, cannot be sold or purchased. However, it is possible for owners of the adjoining property to build on the Maritime Zone with a special permit granted by Executive Order.

ii Environment

Any real estate project, subdivision or infrastructure must apply for and obtain environmental approval from the Ministry of the Environment and Natural Resources, pursuant to General Law on the Environment and Natural Resources 64-00, which regulates environmental pollution, the generation and control of toxic and hazardous substances, and the treatment of domestic and municipal waste, among other matters. Environmental due diligence is highly advisable for purchases of undeveloped land, as well as off-plan property purchases.

Environmental Law 64-00 requires mandatory insurance for projects needing a permit from the Ministry of Environment.

Issues of environmental clean-ups in real estate transactions are still very rare in the Dominican Republic. Thus far, this has been a problem only in the mining sector. Therefore, there are no general covenants in use. Of course, the parties to a contract are free to insert mutually agreed terms regarding long-term environmental liability and indemnity issues.

iii Tax

A conveyance tax must be paid before registering the purchase of real estate. The conveyance tax amounts to 3 per cent of the price of sale or the market value of the property as determined by the tax authorities, whichever is higher.

Furthermore, a 1 per cent annual tax is assessed on real estate properties owned by individuals, based on the cumulative value of all the properties owned by each individual as appraised by government authorities. Properties are valued without taking into consideration any furniture or equipment to be found in them. For built lots, the 1 per cent is calculated only for values exceeding 8,138,353.26 Dominican pesos. The amount of the exemption is adjusted annually for inflation. For unbuilt lots, the 1 per cent tax is calculated on the actual appraised value without the exemption. The real estate tax is payable every year on or before 11 March, or in two equal instalments: 50 per cent on or before 11 March, and the remaining 50 per cent on or before 11 September.

The following properties are exempt from paying real estate tax: farm properties; homes whose owner is 65 years old or older, and has no other property in his or her name; and properties owned by companies, which pay a separate 1 per cent tax on company assets. Owners who have obtained their Dominican residency under Law No. 171-07 on Special Incentives to Retirees and Fixed-Income earners of foreign source are also eligible for a 50 per cent exemption of their real estate taxes.

iv Finance and security

Mortgages (financing from third parties) and privileges (seller's financing) are the customary security interests. Both grant the lender a registered right on the property (collateral) that can be enforced in case of default through a foreclosure process. Holders of mortgages and privileges must go through a court-supervised foreclosure procedure to execute the mortgage; automatic defeasible conveyances in the event of default are illegal.

Leases of business premises

Dominican law is very protective of tenants' rights and there is no fast and efficient eviction procedure in place. Key provisions in a Dominican lease include:

a. the lease's term;
b. tacit renewal clauses;
c. ownership of betterments made by the tenant during the lease;
d. default clauses and waiver of certain tenant-friendly statutory provisions;
e. clear distinction between minor and major repairs and who will be the responsible party to cover these; and
f. specific use of the property during lease term (e.g., the type of business and activities allowed).

Frequently, the tenant has to find a guarantor to co-sign the lease. Dominican law requires landlords to deposit mandatory security deposits (in an amount equivalent to one, two or three months of rent, depending on the term of the lease) at the government-controlled Agricultural Bank. According to recent case law, this deposit is no longer required prior to initiating procedures against the tenant.

In the event of breach of lease terms, tenants can sue landlords for the specific performance of any obligation assumed by the landlord in the lease, as well as claim damages. The landlord, similarly, can sue for specific performance and damages, as well as for eviction.

The customary procedure to evict a defaulting tenant is to sue in court. The process is very time-consuming for two reasons:

a. before suing, the landlord is required in many cases to go through an administrative procedure that usually grants the tenant grace periods of six months or more; and
b. eviction orders by lower courts are subject to appeals to two higher courts, which lengthens the process to three or more years if the tenant retains the services of a savvy lawyer.

General contract law applies to the lease, but is limited by various statutes that protect the tenants. For example, if there is no escalating clause for rent in a lease, the landlord cannot raise it unilaterally without undertaking a lengthy administrative procedure.

Owners and tenants face a standard strict tort liability (custody-based liability) for real estate they own or lease for damage suffered by third parties on their property, if the property has played an active role in causing the damage, or for environmental damages.

There are different tax treatments with regard to leasing to individuals or to corporate entities: leases to entities are subject to value-added tax and leases by individual landlords are subject to a 10 per cent withholding tax that is credited towards the landlord's annual income tax.

Developments in practice

Despite the effects of the pandemic and based, to a certain extent, on the Central Bank's lax monetary policy, the real estate industry has expanded significantly during 2021. Similarly, real estate deals involving local financing have also increased compared to the pre-pandemic market, as well as those developed under Dominican Tourism Incentive Law 158-01 and Trust Law No. 189-11, which provide tax incentives to both developers and buyers. Hotels began reopening in July 2020 and most of them are back in operation for what is turning out to be one of the busiest tourist seasons since the beginning of the pandemic, with occupancy levels surpassing those of 2019.

No new legislation on real estate matters has been passed this year.

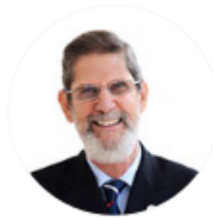
Outlook and conclusions

Despite initial fears of a major economic slowdown, the outlook for the Dominican economy in general, and for the real estate sector in particular, is bright. As mentioned before, the Dominican economy is expected to finish 2021 with an outstanding 13 per cent growth. In September 2021, the Tourism Ministry announced the approval of 136 new tourism and real estate projects totalling US$5 billion in new investments; these projects include new hotels, real estate developments and mixed-use ones, for a total planned construction estimate for the coming years of at least 19,000 new rooms throughout the country.

Major financial institutions forecast the Dominican economy as the fastest-growing economy in the region in 2022, highlighting among other things its impressive fiscal consolidations and its progress on structural reforms (i.e., long-awaited electricity reform), all in the context of political stability. Risk rating agencies have also upgraded the rating for the Dominican Republic's real estate industry in their 2022 outlook.

Footnotes

1 Fabio J Guzmán Ariza is a managing partner and Alfredo Guzmán Saladín is a partner at Guzmán Ariza.



Fabio J Guzmán-Ariza

Guzmán Ariza

Alfredo Guzmán Saladín

Guzmán Ariza

Fabio J Guzmán-Ariza

Author

fguzman@drlawyer.com

Alfredo Guzmán Saladín

Author

aguzman@drlawyer.com