

Litigation 2011 – Dominican Republic

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1 Outline the court system in your jurisdiction.

The court system in the Dominican Republic is unitary. It is divided territorially into Judicial Departments and Judicial Districts. The Supreme Court of Justice is the highest jurisdictional authority in the Judicial Branch and has nationwide jurisdiction. It holds exclusive jurisdiction for criminal actions against highest-ranked members of public, diplomatic and judicial offices, as determined by the Constitution of the Dominican Republic (see articles 152 to 154), and it also functions as a cassation court to review the application of the law by lower courts.

There are eleven Judicial Departments, and each department has a Court of Appeals that may be divided in chambers by areas of law (civil and commercial chamber, criminal chamber, for labour matters, infants and adolescent matters), or have plenary jurisdiction. Courts of Appeals are composed of five judges, although they may validly session with only three of them being present. Their jurisdiction extends to challenges against decisions rendered by First Instance Courts. Exceptionally, Courts of Appeals may act as first instance courts in criminal cases against judges from first instance courts, district attorneys, mayor of the National District and the municipalities, and members of decentralised state agencies, in accordance with article 159 of the Constitution.

Judicial Departments consist of various Judicial Districts. Each Judicial District has a First Instance Court. These courts are presided by only one judge. As Court of Appeals, these courts may be divided in chambers by areas of law (civil and commercial chamber, criminal chamber, for labour matters, infants and adolescent matters), or have plenary jurisdiction. As an exception, the First Instance Courts for criminal matters are formed by three judges.

2 What remedies are available to a party that is in a dispute with a foreign entity? Do the laws provide foreign entities the same rights afforded to local entities?

The Constitution and the Civil Code recognise the same rights and remedies to foreign entities as national entities (except for the 'judicatum solvi' bond as explained in question 28).

3 What is the most common type of litigation encountered in your jurisdiction by foreign entities (for example, claims for breach of contract, employment or some other issues)?

The most common types of litigation encountered by foreign entities are employment claims, damages claims, and claims for breach of contract.

4 How frequently do parties pursue criminal actions in the context of commercial disputes? May criminal trial evidence be adduced in follow-on civil litigation? May civil cases be brought concurrently or after criminal litigation?

In the context of commercial disputes, parties rarely pursue criminal actions.

Civil action for damages, when derived from an act punishable by the criminal laws may be brought concurrently with the criminal action, pursuant

to article 50 of the Code for Criminal Procedure. When the civil action is filed separately before the civil judge, the civil action shall be stayed until a final decision is reached on the criminal aspect; a criminal court must reach a determination that there has been a criminal violation of a particular provision of the Penal Code before civil damages can be awarded for such a violation. Also, once the civil action has been filed before the civil courts, it may not be waived to then be pursued before the criminal courts together with the criminal action.

Trial evidence used in a criminal action may be adduced in follow-on civil litigation.

5 Is there a right to a trial by jury in a commercial dispute?

No, there is no jury trial in any of the cases that are brought before judicial courts in the Dominican Republic, be it criminal, civil, commercial or any other nature.

6 Do courts require mediation before or during a litigation proceeding?

No mediation is required by law before or during a litigation proceeding. Exceptionally, proceedings related to labour matters and traffic accidents go through a conciliation phase before trial. In case of labour matters, this mediation takes place before the same judge that is to hear the merits of the suit or before the Ministry of Labour, depending on the nature of the dispute. Also in private criminal actions defined by article 32 of the Criminal Procedure Code, there is a conciliation hearing following the presentation of the accusation, and prior to the trial hearing, which is held before the empowered judge.

FOREIGN LAW

7 Will choice of law and choice of forum provisions in a contract be enforceable?

Choice of law and choice of forums in a contract are enforceable.

The courts shall respect the autonomy of the parties' will and dismiss the claims when a party invokes a defense on lack of jurisdiction based on the contractual provisions, in accordance with article 3 of Law 834 dated 15 July 1978.

With respect to choice of law provisions, in general Dominican courts do not have jurisdiction to decide a case based on a law different to those that are part of our legal framework, except when the party that claims the application of a foreign law asserts the legal texts through the declaration of two practicing attorneys from that foreign jurisdiction. The attorneys' declarations have to be duly certified by the nearest Dominican consulate or by apostille. If the party does not comply with this requirement, the empowered court will not enforce the choice of law provision, but decide the case based on principles of Dominican law (SCJ, Civil Chamber, Judgment No. 6 dated 11 April 2007).

It is important to note in the case of a foreign entity dealing with a Dominican counterpart, that a Dominican may file an action against any foreigner before the courts of the Dominican Republic. The foreigner's defense may be

based on choice of forum grounds but never on lack of personal jurisdiction.

8 Will courts in your jurisdiction apply foreign contractual law?

As indicated in the previous question, the application of foreign law in general is subject to the presentation of the declaration of two practicing attorneys from the jurisdiction whose law pretends to be enforced, justifying the text of the law.

9 How may a party enforce a foreign judgment?

Foreign judgments may be enforced with the authorization or 'exequatur' of a Dominican court. The request for exequatur is an adversary proceeding. It is filed before the First Instance Court of the domicile of the party against whom the judgment is going to be enforced, or the domicile where assets are located, in accordance with article 59 of the Civil Procedure Code. A court will grant the authorization following the requirements established in international treaties, if applicable; in all other cases, courts have the obligation to verify that the judgment is not contrary to the Constitution of the Dominican Republic or rules of public policy; is definite and irrevocable according to the laws of the place it was issued; and has been certified by the Dominican consular authorities in the place where it was issued.

TIME FRAMES

10 How much time does a party have to answer a complaint? Can a party extend this time?

In civil and commercial cases, briefs or responses to a complaint are filed after evidence has been submitted by each party to the court. A complaint is served through bailiff's act to the defendant, who has a 10-day term to appoint an attorney for his or her case. The attorney notifies its appointment to the attorney of plaintiff. Although preliminary, such action is considered to be a 'response' to the lawsuit. A hearing is then scheduled for the case to be heard before the corresponding court. It is customary that in the first hearing, parties request and courts order the filing of documents. In a second hearing, parties may proceed to request an extension of the term previously granted by the court to file documents; request the appearance of witnesses, experts or the parties themselves, or request any other evidentiary measure. If such requests are ordered a new hearing is scheduled, or else, parties will proceed to present at the hearing their motions over the merits of the case. Terms will be given to both parties to file supplementary briefs with the court. After such terms have expired, the case will be pending judgment.

It is important to note that although civil and commercial cases are instructed by the same chamber, different rules of procedure may be applied.

In labour matters, at first instance level a party has up to the date of the hearing to file the response to a complaint, according to article 513 of the Labour Code, and in appeals it has ten days counted from the date the appeal is served. A party may request the court to extend the term provided by the Labour Code.

11 How long does it take to obtain a first-instance judgment in a typical commercial litigation case?

In civil and commercial cases, it may take up to 18 months from the date of the complaint to obtain a first-instance court judgment.

EVIDENCE

12 Is a party required to submit all facts, arguments and supporting evidence with its initial pleading?

As provided in articles 61 and 65 of the Civil Procedure Code, plaintiffs have to submit with its initial pleading the facts and arguments in support of their claims as well as the evidence. In practice, however, evidence may be submitted either with the initial pleading or throughout the instruction of the case, as previously indicated, following the orders or preparatory sentences issued by the court.

13 Does litigation provide a process for investigating claims or right to discovery of evidence prior to trial?

No, there is no right to discovery of evidence or process for investigating claims prior to trial. Parties may voluntarily exchange documents prior to the hearing, but that rarely occurs. There is no discovery process, hence a party may not rely

on the documents that would be retrieved from the counterparty. Each party has the undertaking of submitting all evidence in support of their own arguments, according to the rule 'actori incumbit probatio' that is stated in article 1315 of the Civil Code. As per articles 55 and 59 of Law 834, one party has the right to request from the other party or from a third party the submission of a specific document. The indication of the document should be specific, since 'fishing' of documents is not allowed.

Article 448 and 480 of the Civil Procedure Code provide a party the right to appeal or request a review of the decision rendered in favour of the counterparty, as a result of the retention of documents decisive in the solution of the dispute.

It is important to point that in the court system of the Dominican Republic, civil and commercial claims go through one trial per instance. Hearings for the taking and presentation of evidence, and hearings on the merits are one same stage of the proceedings.

14 Does litigation provide a process to subpoena or obtain documents or testimony from third parties?

As stated before, a court may issue an order requesting a third party to deliver a certified copy or the original of the document cited by the party in his or her request (see articles 55 to 59 of Law 834 that amends the Civil Procedure Code).

Also, testimony may be obtained from a third party when he or she has been duly summoned to the hearing. Failure to comply with such requirement may result in the imposition of a fine by the judge, in accordance with articles 75 and 76 of Law 834.

A third party whose rights may be affected by a judgment related to a case in which he/she is not a party, may be called upon to intervene in the process through an act served by bailiff (see articles 339 to 341 of the Civil Procedure Code).

In criminal cases when the witness does not appear after being duly summoned, the judge or the District Attorney may be compelled to attend by use of public force. At the request of the District Attorney, the judge may impose a fine of up to thirty days of base salary of a first instance judge, against the reluctant witness who does not attend or does not satisfy the object of the summons (see articles 199 and 203 of the Criminal Procedure Code).

15 Does the judge or opposing counsel examine witnesses?

According to articles 82 and 83 of Law 834 that amends the Civil Procedure Code, the witnesses are first examined by the judge. Parties may also formulate questions to the witnesses proposed by the party itself and the opposing party. In civil and commercial matters such questions are presented through the judge. In criminal matters the interrogation is performed directly to the witness.

16 How may evidence be challenged?

Judges have a sovereign power to determine and evaluate the credibility of documents submitted by the parties. However, documents filed as evidence can be challenged on grounds of being false or fraudulent. Witnesses can be challenged if affected by a legal incapacity to act as witness before a court.

According to articles 166 to 172 of the Criminal Procedure Code, in criminal matters evidence may be challenged if illicit or taken inappropriately by the investigating entity (the District Attorney or the police), in violation of the rights and guarantees of the accused foreseen in the Constitution, international treaties and the Criminal Procedure Code.

17 Do courts typically allow hearings at or before a trial? At what stage may parties present expert witness testimony?

As previously indicated, in civil and commercial matters, a trial is the whole process before the court. We do not have a pre-trial stage. Parties present witness testimony after the court orders such evidentiary measure.

18 What must be demonstrated to collect a debt based on a written instrument?

In order to collect a debt based on a written instrument, the creditor must show

that the credit contained in the instrument is certain, non-disputed, and its payment is due. A collection action is filed before the first instance court. As per article 1315 of the Civil Code, if the debtor disputes the existence of the debt, it must present evidence of payment to the court.

According to Dominican law, different types of written instruments afford different enforceability rights to the holder. For instance, a holder of a promissory note granted before a Notary Public, has the same power as a holder of a final judgment and therefore may be able to enforce its collection rights over the assets of the debtor without judicial intervention.

MISCELLANEOUS CLAIMS

19 What remedies are available in your jurisdiction to a minority shareholder of a corporation in a dispute with the corporation or the majority shareholders?

According to article 36 of the General Law on Corporations and Limited Liability Proprietorships No. 479-08 dated 11 December 2008 (Law 479-08), any shareholder with a participation of 5 per cent of the capital of the entity, has the right to be informed at all times of the economic situation and status of the accounts of the corporation. Moreover, prior to the General Annual Meeting, all shareholders have the right to obtain a list of the shareholders, the draft of the resolutions to be proposed at the meeting, auditors' financial statements, annual reports of the Board of Directors and Comptroller, information of the global amount paid to the managers of the company, and a list of the contracts executed by the company. Failure to obtain such documents and information, may give rise to an action before the President of the Civil and Commercial Chamber of the First Instance Court, acting as judge of the *referimientos*, by any of the shareholder, to compel the managers or administrators of the company to furnish such documents and information. The judge may impose a cumulative fine (*astreinte*) for each day that passes until compliance is obtained. All fees and legal expenses shall be borne by the managers.

Shareholders representing at least a tenth part (10 per cent) of the paid social capital, acting jointly or individually, may also request to the President of the Civil and Commercial Chamber of the First Instance Court, acting as judge of the *referimientos*, to appoint one or more experts for the presentation of a report of certain operations carried out during the social period. Shareholders representing at least a tenth part (10 per cent) of the paid social capital may also request the judge of the *referimientos* to relieve comptrollers from their duties.

20 What rights are available in the courts for someone holding a maritime lien interest in a vessel?

Articles 190 and 191 of the Commercial Code indicate the types of credits that have priorities over vessels. In order to enforce such rights, the creditor may obtain from a court an authorisation and seize a vessel. A vessel that is ready to sail may not be seized. Law No. 603 on Maritime Mortgages, dated 20 May 1977, as amended, establishes a procedure to register a mortgage over a vessel and enforce it. The process is similar to that followed in case of a real estate mortgage.

21 What rights are available for a party holding a security interest in real property and personal property?

Parties may pursue the recovery of their amounts based on the security over real or personal properties. Different rights and rules apply to the enforcement depending on the security interest.

In general, a creditor that has a registered security has a preference right with regards to other creditors. This means that this creditor will first recover the full amount owed from the proceeds of the public offerings of the property, contrary to the general group of creditors who will proportionately distribute the remaining of the proceeds among them. In general, the preference right is subject to a rank depending on the order in which the mortgages of different creditors have been registered. The creditor also has a right to pursue the asset even if it is under the possession of the debtor or a third party.

22 Describe the types of employment disputes that frequently result in litigation.

Most labour disputes arise out of the termination of labour contracts due to dismissals (*despido* or *desahucio*) with or without cause made by the employer. In most cases, employees require payment of labour severances and acquired rights. Labour courts are in general pro employees. The Labour Code establishes that in case of doubt, the court must favour the employee (in *dubio pro operario*).

23 Does your jurisdiction allow class actions or some form of collective litigation proceeding?

In civil and commercial matters, class actions are not expressly foreseen in the law. In environmental and criminal matters as well as in consumer actions, non-profit organisations or associations or groups of individuals, may pursue a claim when the collective interests have been affected.

24 Do government-owned or controlled entities enjoy any privilege when they are engaged in commercial activity and involved in a commercial or administrative litigation?

No privilege is legally recognised to government owned or controlled entities involved in commercial or administrative litigation. However, the Dominican state as well as its dependencies are not subject to attachment or embargoes.

RELIEF

25 Is injunctive relief available on an emergency basis?

A similar relief to an injunction is the *referimiento* action (from the French *référé* claim), which is brought before the President of the Civil and Commercial Chamber of the First Instance Court or the President of the Court of Appeals. It is a simplified procedure for taking an interim emergency measure, similar to a common law injunction, and has the objective of preventing in a preliminary manner an imminent damage from occurring or to put an end to a manifestly unlawful disturbance. The main elements of this action are the need of urgency in the request, the temporary nature of the decision, and the objective to prevent an imminent injury or put an end to a manifestly unlawful disturbance.

26 Is injunctive relief available as part of a final award? If so, in what types of cases do courts usually provide injunctive relief?

There is no exact figure to injunctive relief in a final award in our system, however, courts may order a party through judgment to perform an obligation or refrain from doing something.

FEES AND DAMAGES

27 What are the typical court fees and costs required to file a civil lawsuit?

As stated in article 149 of the Constitution, the administration of justice is provided to the community free of charge by the Judicial Branch. Despite this provision, minimum fees are paid to cover the expenses for bailiff's acts, and request to schedule a hearing with the court.

28 Is a bond required for non-residents? What is the amount of the bond?

According to article 16 of the Civil Code and articles 166 and 167 of the Civil Procedure Code, non-residents or transient visitors are required to post a bond as assurance of the payment of legal fees and damages (*judicatum solvi* bond) if acting before a court as plaintiff, unless the non-resident owns real estate of sufficient amount to cover the legal fees and damages that may be awarded. The Codes do not specify an amount. According to Law 479-08 in its article 11 paragraph 1 *judicatum solvi* bond is not required for foreign companies duly registered in the Dominican Republic. The bond may not be required to US citizens as per the DR-CAFTA or to plaintiffs from countries who are part of the Inter-American Convention on Private International Law of 1928 (*Código Bustamante*).

This bond is not applicable in labour claims.

29 What damages are available? How are damages quantified? Are punitive damages available?

Under Dominican law there are compensatory damages, which may be material, and moral damages. According to article 1149 of the Civil Code, which applies specifically in the context of contractual disputes, the available material damages are for the losses and for the sums plaintiff was deprived from gaining (daño emergente and lucro cesante). This provision is the equivalent to consequential damages. The court shall only take into account the damages foreseen by the parties when entering into the contract, except in case there has been bad faith from the debtor where even unforeseeable damages may be awarded. Bad faith has to be proven, as there is a legal presumption of good faith.

Damages must be evaluated by the trial judge, who has the sovereign power to assess them, but, likewise, has the obligation to state the elements used to evaluate the damages. The evaluation of the material damages must be in accordance to the evidence provided.

The Supreme Court of Justice has admitted that there are two kinds of moral damages, those that affect the social aspect of the individual (honour, reputation, etc), and those that affect the emotional aspect of the individual (suffering caused by the death of a loved one). The standard that must be met is the following: the moral damage, like the material one, must be certain; and it is individual, meaning that only the person that claims to have suffered a moral damage can be awarded compensation. Companies may be not awarded moral damages; however, damages may be awarded for loss of goodwill such as in the case of unfair competition claims.

The Dominican Republic does not recognise punitive damages.

30 Is the losing party liable for attorneys' fees? If so, how are attorneys' fees determined?

Following the provisions set forth in article 130 of the Civil Procedure Code, the party against whom the decision is rendered shall bear the costs of the process.

The Dominican Republic has in effect Law 302 on Lawyers' Fees dated 18 June 1964, which sets forth a minimum amount for the fees lawyers are entitled to for their professional work, in judicial or extrajudicial work. Pursuant to article 1 of said law, attorneys may enter into agreements where they accept higher fees than those established in the law to the extent permitted by the law. Third parties condemned to the payment of legal fees and costs, shall only be required to pay the minimum pursuant to the law.

31 Will courts enforce a liquidated damages provision in a contract?

Article 1226 of the Civil Code permits the parties to agree to liquidated damages for particular breaches of the agreement. Thus, they are enforceable, except when included in standard form agreements where no negotiation of the terms of the contract has taken place between parties. As stated in article 1152 of the Civil Code, courts shall not surpass this limit set conventionally by the parties, except in case of bad faith, or a severe or intentional fault from the debtor.

APPEAL

32 What is the appeal process against trial court decisions?

After a judgment is served, in civil, commercial and labour matters the party against whom it is served has a one-month term to appeal. In civil and commercial cases, the appeal process initiates with an act served to the defendant stating the arguments in support of the appeal. The process is instructed before the Court of Appeals de novo; parties have to submit evidence and may propose witness and any other measures even if the same were ordered and fulfilled before the first instance court. The Court of Appeals will be bound to decide based only in the scope of the appeal, if the judgment is not entirely challenged.

33 How frequently do appellate courts reverse trial court decisions?

The frequency of overturning first instance judgments varies depending on the nature of the case and the territory. When a severe violation of one party's rights in a trial has occurred, it is certain that an appellate court will render a more reasoned decision, since it is the view and opinion of three or more judges, compared to the sole decision of a first instance judge.

34 May the courts challenge administrative decisions made by federal or local governments? If so, how frequently do courts reverse administrative decisions in favour of a private party?

Individuals may challenge administrative decisions that have a direct effect over their interests. A specialised court was instituted for such purposes. The decisions of the special court, the Administrative and Tax Contentious Court may be challenged before the Supreme Court of Justice. Law 13-07 sets the procedure to be followed before the Administrative and Tax Contentious Court.

The Administrative and Tax Court has stayed or revoked decisions taken by the government in numerous occasions.

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