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Brazil

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Brazil.

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BRAZIL
LENDING & SECURED FINANCE

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

No, as far as cross-border loans are concerned.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

There is a certain controversy on the actual limit applying to either interest rate or default rate in Brazil. However, in the opinion of most Brazilian scholars and precedent cases interest rates are limited to 12% a year and default rates shall not be 1% higher than the applicable interest rate. As ruled by Brazilian courts, such limitations do not apply to transactions that are carried out by institutions that are part of the Brazilian financial system (such as banks, leasing companies, etc.) or on the Brazilian capital market. In addition, such ruling has been further extended to cross-border loan transactions by other lower Brazilian court decisions.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

New Foreign Exchange Law and regulations came into force in Brazil on December 31, 2022. As a general rule, in the event of a cross-border loan, all transfers of funds from abroad to Brazilian companies must be made through a bank. In addition, if the amount or payment term of a foreign loan, import finance, leasing, export payment in advance and issuance of securities on the foreign market exceed certain thresholds, then the main terms of the relevant transaction must be reported in the Central Bank of Brazil's electronic Foreign Capital Information System – Foreign Credit / SCE-Credit. Such information must be provided by the Brazilian borrower prior to the inflow of any loan amounts into Brazil.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

All assets mentioned above when situated in Brazil can be subject to a security interest under Brazilian law.

If so, what is the procedure – and can such security be created under a foreign law governed document?

In order to enable the creation of a lien on a property or asset situated in Brazil, the relevant security document must be governed by Brazilian law.

Except for the creation of a security (either mortgage or fiduciary transfer in guarantee) over real property in an amount exceeding 30 times the highest minimum wage in Brazil (i.e., currently R$ 42,300 and equivalent to USD 8,500 approximately) that must be executed by the parties before a Notary Public in Brazil, other security documents can be entered into by means of private instruments signed by the parties. In all events the security documents must be legalized and registered, as explained in 7 and 8 below.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Under Brazilian law, each property, asset or right given as a security must be fully identified at the time the lien is perfected. It is thus not possible to create a lien on future assets, real property, accounts and inventory that

cannot be identified.

As a requirement for the effectiveness of any security document (whether mortgage, pledge or fiduciary transfer in guarantee), such document must contain a description of: (a) the total debt or an estimate thereof; (b) the repayment term; (c) the interest rate (if applicable); and (d) the description of the secured property or asset, along with elements necessary to its identification.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

In principle, this is possible, provided that the identification requirement mentioned in 5 above in connection with each asset is satisfied. In addition, if the assets include a real property in an amount that exceeds the threshold mentioned in 4 above, then the relevant mortgage deed or fiduciary transfer agreement must be entered into by means of a public deed signed by the parties before a Notary Public in Brazil.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

As mentioned in 4 above, if the assets include a real property that exceeds a USD 8,500 total amount approximately, then the relevant mortgage deed or fiduciary transfer agreement must be entered into by means of a public deed signed by the parties before a Notary Public in Brazil. For other types of assets, the security documents can be entered into by means of a private instrument, signed by the parties.

Notarization of signatures is required in the event of security documents entered into by means of private instruments signed in Brazil and to be registered in a Real Estate Registry.

In respect of any security document entered into by means of a private instrument signed abroad, then such document must be notarized by a local Notary Public and thereafter apostilled by the competent authorities, provided that the relevant country is a contracting state to the Convention Abolishing Legalization for Foreign Public Documents dated October 5, 1961 (the "Hague Convention") or, if not, consularized by a Brazilian consular office, as applicable. Moreover, if any security document is drafted in a language other than Portuguese, it must be translated by a certified translator in Brazil and registered with a Registry of Titles and Documents.

8. Are there any security registration requirements in your jurisdiction?

A security document must be registered (i) in case of real property or a pledge of inventory, in the competent Real Estate Registry in the city where such property or the asset is located, or (ii) in the event of movable assets, including receivables, with a Registry of Titles and Documents in the Municipality in Brazil where the borrower is domiciled.

In addition, in the event of shares, the relevant security document must be further registered in the appropriate corporate books or, in the event of a limited liability company, stated in its Articles of Association

The security document must be further registered with (i) the State Departments of Transportation, in the event of vehicles, (ii) Brazilian Aeronautical Registry, in the event of aircraft, (iii) the Brazilian Maritime Registry, in the event of shipping, and (iv) Brazilian National Institute of Industrial Property, in the event of intellectual property.

Finally, as a requirement for the effectiveness of a pledge over or a fiduciary assignment of receivables against the relevant debtors of such receivables, the debtors must be notified of the institution of the security and provided with instructions for the payments to be made to the relevant beneficiary of the security.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

The perfection of a security document in Brazil requires the payment of notarization, sworn translation into Portuguese, if applicable, and registration fees. Notarization fees usually are not relevant. Sworn translations are charged based on the number of pages translated and registration fees on the underlying transaction total principal amount to be secured by the security document. Usually, lenders require the fulfillment of the formalities needed to be accomplished

for the perfection of the security interest as a condition either precedent for the disbursement of the funds or post-closing, failure of which may cause an acceleration of the debt maturity.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

There is no legal provision in Brazilian laws prohibiting a Brazilian company from guaranteeing or securing obligations of a parent company, subsidiary or other members of its corporate group.

However, as per a general rule of Brazilian corporate laws, a company shall only perform activities and acts that are compatible with its corporate purposes. In this sense, the grant of a guarantee or a security by a Brazilian company to a loan to be applied to only for the benefit of its shareholders or affiliates could in theory be judged as an act incompatible with its corporate purpose. Notwithstanding such possibility, the grant of a guarantee or a security by a Brazilian company to secure its parent company's obligations is not unusual and to the best of our knowledge there are no precedent cases specifically ruling such acts as fraudulent.

Finally, as per a rule of Brazilian law, unless otherwise expressly set forth in the respective security document, a third-party guarantor is not compelled to replace or reinforce the object of a security (so as to avoid the acceleration of the secured debt) in the event that, regardless of guarantor's fault, such object gets lost, becomes deteriorated or is devalued.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Same comments as in 10 above.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

As per general rules of Brazilian law, security interests are to be instituted in favor of the creditor of the underlying obligations to be secured by such security interests. However, under a law very recently enacted in Brazil and that has not been tested in courts yet, the role of an agent or trustee and its power to hold and enforce a security under Brazilian law on behalf of a syndicate of lenders have been regulated.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

Please refer to our comments in 12.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

Although a party's choice of law is not excluded by Brazilian conflict of law rules, its application may be limited in certain cases where Brazil is considered to be the place of contracting or performance of the obligations deriving from the related agreements. In addition, a provision of a foreign law shall not be upheld as valid when it is considered to be in violation of a public policy, morality or sovereignty of Brazil or a fraud under Brazilian law.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

The courts of Brazil usually recognize as valid and enforce final judgments issued by foreign courts, provided that such judgments do not offend Brazilian public order and sovereignty and good morals, and

provided further that an “exequatur”, which can be defined as an enforcement order, is issued by the Brazilian Superior Court of Justice.

Brazil is a party to the New York Convention ratified on 23 July 2002 (Decree No. 4,311), among others, such as the Panama Convention, ratified on 9 May 1996 (Decree No. 1,902), the OAS Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards

(the Montevideo Convention) and the OAS Inter-American Convention on International Commercial Arbitration of 1975.

16. What (briefly) is the insolvency process in your jurisdiction?

Brazilin Law 11,101/05 (as amended, the “Brazilian Bankruptcy Law”) provides three mechanisms to deal with financially distressed companies:

(1) Judicial restructuring. A debtor-in-possession court supervised reorganization proceeding, inspired by Chapter 11 of the US Bankruptcy Code, in which the debtor submits a restructuring plan for creditors’ approval and court confirmation. If a restructuring proceeding is filed, the debtor shall enjoy a 180-day stay that may be extended for an equal period, during which required majorities of creditors must approve a reorganization. If a plan is not approved, the company will be liquidated. It is worth mentioning that as a result of a reform of Law 11,101/05 in late 2020, creditors have been granted the right to impose a reorganization plan on the debtor, prepared exclusively by them, whenever the debtor’s plan is not offered in a timely manner or when it is rejected at the creditors’ meeting.

The debtor maintains management of an insolvent entity.

(2) Extrajudicial restructuring. A proceeding where the debtor is able to obtain an agreement with a class or group of creditors before filing a restructuring. A debtor may propose an extrajudicial restructuring to one or more classes of creditors, or groups of creditors which share similar economic interests. If more than 50% of the credits belonging to that class or group approve the plan, it becomes binding on all creditors in such a class or group upon court confirmation.

All claims subject to a judicial restructuring may also be subject to extrajudicial restructuring, provided that for labor credits an agreement with the relevant Union is required.

(3) Bankruptcy, or liquidation. Upon declaration of bankruptcy, the debtor loses control of the activity and is replaced by a judicial administrator. The assets of the bankrupt estate are collected, appraised and subsequently sold, preferably as a going concern, in order to pay creditors in accordance with priority rules provided by law. Labor claims have the highest priority, but only up to the limit of 150 minimum wages per claim. Secured claims, up to the value of the security, rank second. Unsecured and subordinated credits come last in the list of priorities. These three alternative procedures are available to any business entity, with the exception of certain entities, such as financial institutions, insurance companies, cooperatives and government owned entities.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

As explained in 25 below, creditors that hold title or ownership rights as security to assets are, in principle, not affected by an insolvency filing and are therefore authorized to enforce their rights.

Courts have however been resistant to applying this rule, in its strictest sense, whenever the enforcement of such rights during the stay period can jeopardize the reorganization of the insolvent company. Several theories have emerged to justify this position, amongst which are the “essentiality” of the asset, the lack of “individualization” of the credit, the recognition that the acceleration clause of such a debt is subject to the filing or even the partial enforcement of the rule.

These matters are still being discussed at all levels in the state courts and a final definition has yet to be established.

18. Please comment on transactions voidable upon insolvency.

The claw back period is up to 90 days before an insolvency is recognized. However, a fraudulent conveyance may be declared whenever an asset transfer leaves the debtor without the means to pay its debts at the time of the transfer, provided that the transfer reduces the creditor’s ability to recover its credits. In addition, if there is an enforcement lawsuit pending, a creditor has the right to attach the transferred assets directly, if the debtor is left without assets to pay the debt which is already being enforced (fraud against enforcement).

19. Is set off recognised on insolvency?

As per a general rule of the Brazilian Bankruptcy Law, credits may be offset against borrowings and other obligations, provided such credits were not assigned to the assignee after the declaration of bankruptcy, and further subject to satisfaction of the Brazilian Civil Code requirements applying to the setoff of obligations (i.e., the debts that are certain, past due and of fungible assets), have been met. However, in case of judicial and extrajudicial restructurings, the Brazilian Bankruptcy Law does not contemplate the treatment to be applied to the set off. In this event, Brazilian courts have held opinions in favor or against the set off on a case-by-case basis but generally as per the same above-mentioned requirements applying to a bankruptcy situation.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

The Brazilian Bankruptcy Law expressly excludes certain creditors from the effects of a judicial restructuring. Thus, a creditor holding the position of fiduciary owner of real or personal property, financial lessor, owner or committed seller of real estate whose respective agreements include an irrevocability or irreversibility clause, including real estate developers, or an owner under a sale agreement with retention of title, should not have their claims subject to the effects of a judicial restructuring, and the ownership rights over the item and the terms of the agreement shall prevail, with due regard to the respective law. In any event, during the stay-period, the creditor may not remove, from the debtor's facilities, any capital goods essential to the debtor's business, as mentioned in 22 above.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

A bill of law aiming to increase creditors' powers under judicial restructuring and bankruptcy proceedings is currently under discussion in the Brazilian Congress. Briefly, it contemplates the increase of creditors' control over the appointment and performance of judicial administrators acting under such proceedings, the restructuring plan to be approved thereunder and the assets to be sold for the repayment of the debts. This bill of law has been recently approved by the Brazilian House of Representatives and sent to the Brazilian Senate for review and approval.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Main financing providers are currently traditional banks. However, it is expected that in the post-crisis Covid-19 pandemic recovery, transactions involving private credit (that is, extension of loans by nonbank actors) and issuance of bonds on capital markets can significantly increase.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

There is no significant factor to be mentioned in respect of specific changes to the drafting of secured lending documentation and the structuring of such deals.

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