Loan signing and drawdown (CP) Q&A: Brazil

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This Q&A provides country-specific commentary on *Practice note, Loan signing and drawdown (CP) checklist: Cross-border*.

Checklist, Loan facility agreement signing: Cross-border

1. Is it necessary or customary for the parties (or their lawyers) in your jurisdiction to attend a meeting at which the facility agreement and other documents are signed and exchanged between the parties?

It is not necessary for the parties or their lawyers to attend a meeting at which the facility agreement and other documents are signed and exchanged between the parties. These meetings are customary when both parties (or their representatives) are located in the same country. However, since the COVID-19 outbreak meetings have become less common. There are no particular situations in which meetings are necessary.

As a general rule, documents can be signed by the parties in advance of any meeting that is required. However, this does not apply to the execution of mortgages over real estate, vessels and aircraft; these must be created through public deed, requiring the signature of a public notary (in addition to special requirements described in *Question 6*).

There are no laws preventing property deeds to be made in electronic format and signed electronically. However, in some states it is not possible to make these documents in electronic format and to have them signed electronically, due to operational restrictions. In that case, parties are required to attend a meeting with the public notary to sign the public deed.

2. If a meeting is not required, how are facility agreements and other documents signed and brought into effect? In particular, is there any requirement for one and the same document to be signed by all the parties, and can signed "signature pages" be added to the rest of an agreement to form a signed agreement?

Facility agreements do not require specific signature procedures to be brought into effect, and a document is binding if each party signs its counterpart (provided that the counterparts are identical).

There are, however, specific requirements for mortgages over real estate properties in Brazil and documents executed outside Brazil that may have to serve as evidence in local courts and which are to be directly enforced before the Brazilian courts.

Mortgages over real estate properties in Brazil must be created through public deeds, which require special execution procedures (see *Question 6*).

An agreement signed outside Brazil must be notarised by a public notary licensed under the law of the place of signing. The public notary's signature must be authenticated by a consular official of Brazil ("consularisation") or, if the signature was placed in a country that is a signatory to the Hague Convention, the signature must be apostilled. To have legal effect in relation to third parties and to be admitted as evidence before courts in Brazil, foreign agreements must also be translated into Portuguese by a sworn translator and registered before a local Registry of Deeds and Documents.

If these requirements are met, and the agreement is also signed by two witnesses (who do not need to be Brazilian citizens) and indicates Brazil as the place of payment of the debt, the creditor may enforce against the debtor directly. In any other cases, the agreement may be used to obtain a judgement debt against the borrower that can be subsequently enforced.

It is advisable that all signatures, and consularisations or apostilles as applicable, are put in the same counterpart, to avoid potential problems with the register offices. Typical finance agreements provide that the party outside Brazil must cause the agreement to be notarised, apostilled and delivered to the party located in Brazil, which will then attach its signature page to the same counterpart and procure the translation into Portuguese and registration of the agreement.

As a matter of practice, however, in cross-border transactions, lenders tend to prefer to sue abroad and simply ratify the foreign judgement before the Brazilian Superior Court of Justice. The recognised judgement will then have to be enforced before the Brazilian courts. This procedure may not be very efficient in comparison to direct enforcement of the agreement, but tends to prevail due to the greater confidence placed on non-Brazilian courts for judgment on the merits. In these cases, the Brazilian signature requirements described above do not apply, although they tend to be followed as a matter of additional safety.

Finally, Brazilian law requires that an agreement be executed by both parties in the place of the law chosen to govern the agreement, or, in case of counterparts being signed in different countries, the last signature should be made in the country of the designated governing law.

3. What is the date on which an agreement comes into effect under the laws of your jurisdiction?

As a general rule, the date on which an agreement comes into effect is the date on which it is actually signed. If there is a date handwritten on the agreement, this date must be the same as the date when the agreement was signed

(since pre-dated and post-dated contracts are forbidden under the Brazilian Civil Code). If there is no indication of the date of the agreement in its heading, and the parties indicate different dates above their signatures, the date of the agreement will be considered to be the most recent date indicated by the signatories.

The date of signing cannot be any different from the date on which the agreement has been actually signed. The parties can, however, set the date from which the contractual terms are effective at a future or preceding date (instead of the date of signing) by an express contractual clause.

By contrast, security over real estate property of significant value (that is, over USD6,200 approximately), vessels and aircraft, and pledges over assets such as agricultural assets, industrial assets or receivables, are effective as of the date they are registered in the public registries and not as of the date of signing. Accordingly, it is usually advisable to check the timeframe for filing at the relevant registry and, where possible, to prepare any filing documents so that the required documents can be submitted promptly after the security documents have been executed.

4. If a facility agreement is subject to the law of your jurisdiction, would the agreement typically contain a set of conditions which need to be satisfied before drawdown of a loan under it? Would any such set of conditions typically be set out in a list attached to (or forming part of) the agreement?

Yes. Facility agreements typically contain drawdown conditions forming part of the agreement, rather than as a separate list.

5.Might a company seal, or a notary, be needed in the context of a secured financing transaction involving the law of your jurisdiction or a party incorporated in your jurisdiction?

Company seals are not required under Brazilian law.

Notarisation of documents by non-Brazilian notaries is required for agreements executed outside Brazil as a requirement for their serving as evidence in Brazilian courts. This should be followed by their recognition by a Brazilian consular officer nearest to the place of signature ("consularisation"). Finally, the notarised and consularised document should be subject to sworn translation (if drafted in a language other than Portuguese) and registration with a legal Registrar of Deeds and Documents.

Since Brazil is a signatory to the Hague Convention, the consularisation procedure (but not notarisation, sworn translation and registration) may be replaced by apostille recognition if the non-Brazilian signature is made in a country that is also a signing party of the Hague Convention.

Otherwise, the intervention of Brazilian notaries is required in the following circumstances:

- For documents that must be created by public deeds drafted by notaries and subsequently registered with real estate registrars, that is, documents in the finance context, typically mortgages over real estate, vessels and aircraft.
- For agreements that do not require drafting in the form of a public deed, but that must have Brazilian signatures to them acknowledged by a local notary, that is, typically, fiduciary ownership rights over real estate (security in which ownership is transferred to the creditor) and pledges over assets such as agricultural and industrial assets.

Additionally, it is common practice for parties to a finance deal to require that the grantor's signature in powers of attorney be certified by a notary, although this is not a condition for their validity.

Certification of signatures can only be obtained by the presentation of the signed document at the notary's office (by the signatory or a third party). Creation of public deeds, on the other hand, does not require the parties to attend the notary, but instead the notary can attend the signing meeting. Notaries can attend virtual signing meetings and have the public deeds signed electronically, although it might not be feasible in some states due to operational restrictions (see *Question 1*).

Both kinds of notarisation are valid throughout Brazil. The notary's fees must comply with the limits imposed by Brazilian federal and state laws. The fees are around USD2.00 for acknowledgements of each signature, and must not exceed the amount of USD9,500 per real property mortgaged for public deed drafting in the State of São Paulo, where most Brazilian international finance transactions take place and fall to be registered (such amounts being updated annually). Different values may apply in other federal states.

6. Are there any specific requirements as to the form in which a facility agreement or security document is prepared for signature?

There are no mandatory requirements relating to the layout of a loan facility agreement or the form in which a facility agreement is prepared for signature.

Likewise, there are no requirements for security agreements, except for mortgages over real estate of significant value and over vessels and aircraft, which must be created through public deed. Public deeds must be drawn up in Portuguese and must contain:

- The date and place of signing.
- Certification of the identity and capacity of the parties.
- The name, nationality, matrimonial status, profession, domicile and residence of the parties.
- A clear declaration of the will of the parties.
- Certification of compliance with the legal and tax requirements applicable to the act.
- A declaration that the writing was read in the presence of or by the parties.

- The signature of the parties and of the other persons present, together with the signature of the notary or their legal substitute (the signing meeting may be held electronically depending on the state where the public deed is made, see *Question 1*).

7. What public registers normally need to be checked by a lender in the context of a secured financing, and are any fees payable? Are there any arrangements for protecting a lender who has checked a register before entering into a facility agreement, so that the lender is not affected by a subsequent registration?

Public registers normally checked by a lender in the context of a secured financing are:

- Federal and state courts regarding civil, tax, bankruptcy and criminal suits.
- Notaries/public registries charged with issuing presentment notices or protests for payment at the request of creditors.
- Labour courts.
- Revenue collection authorities.
- Agencies or entities of environmental inspection and control.
- Brazilian Ministry of Economy, for evidence of proper enrolment of debtor as taxpayer.

Payment of fees may need to be made to competent authorities before the certificates listed above are issued.

The certificates reflect the borrower's situation at a specific moment, but the borrower may incur further debts after that time. Thus, the creditor is not protected against future debts or liens simply by checking pre-existing information.

A strategy a lender can follow before advancing any loan and after having carried out appropriate due diligence is to impose covenants on the borrower creating an obligation not to incur any additional material debts before repayment. If the covenants are not observed, acceleration of maturity of the agreement would be the consequence.

A secured lender may obtain protection against other creditors directly by properly registering the security, in which case its right will take precedence, subject to applicable bankruptcy rules.

8. What checks does a lender need to make in relation to the corporate status and powers of a borrower, guarantor or security provider incorporated in your jurisdiction, and in relation to the authority of the signatory signing on behalf of such a borrower, guarantor or security provider?

First of all, the lender must check whether the borrower or the guarantor is insolvent, since contracts entered into with insolvent parties are void if the insolvency is of public knowledge or if the lender could reasonably have known the insolvency situation. The notorious insolvency test is a particular concern due to its subjective nature.

The lender typically requires the following documents:

- Audited financial statements of the borrower and guarantor.
- Details of any threatened or pending litigation, arbitration or administrative proceedings against the borrower and guarantor which could have a material adverse effect, such information to be compared with the court certificates mentioned in *Question 7*. As a rule, digital copies of such documents are delivered to the lender's counsel.

To check the corporate status and signing power of debtors and guarantors, lenders normally examine copies of the following documents registered with the competent commercial registry:

- Minutes of the borrower's and guarantor's meeting which appointed the members of their board of officers.
- Minutes of the meeting which appointed the members of the borrower's and guarantor's board of directors (*Conselho de Administração*) (where the borrower and the guarantor have a board of directors).
- The bye-laws (*estatuto social*) of the borrower or guarantor.
- Any powers of attorney properly issued to the attorneys actually signing the documents relating to the transaction.

Based on these documents, the lender will verify whether other corporate approvals are necessary for the borrower and the guarantor to enter into the required documents (such as an officer's resolutions).

For more complex or significant transactions, the result of the above document-checking will be reported in legal opinions confirming, basically, that the borrower and the guarantor are validly constituted and capable of committing themselves under the conditions of the transaction documents, and that the signatories have proper authority.

9. What filing or registration requirements apply to security given by a borrower, guarantor or security provider incorporated in your jurisdiction, and to security created over real property or other assets located in your jurisdiction?

The most common forms of security provided by Brazilian law are pledge agreements, deeds of mortgage, fiduciary ownership and personal guarantees.

The following types of security do not need to be registered in Brazil if they are governed by foreign law and are not expected to be enforced in Brazil, regardless of where the guarantor is incorporated:

- Personal guarantees.
- Mortgages and fiduciary ownership over assets located outside Brazil.
- Pledge agreements over assets in the possession of persons domiciled outside Brazil.

The following types of security must be registered before the competent registry offices in Brazil:

- Mortgages over real property located in Brazil.
- Fiduciary ownership over assets located in Brazil and governed by Law No. 4,728, dated 14 July 1965, as explained below.
- Pledge agreements over assets possessed by Brazilian residents.

Personal guarantees governed by Brazilian law will likewise only have legal effect in Brazil if they are registered.

See below for more detail on Brazilian filing and registration requirements.

General rules for foreign documents

An agreement signed outside Brazil must be notarised by a public notary licensed under the law of the place of signing. The public notary's signature must be authenticated by a consular official of Brazil or, if the signature was made in a country covered by the Hague Convention, it must be apostilled. Foreign documents must also be translated into Portuguese by a sworn translator and registered before a Registry of Deeds and Documents in Brazil. The procedure is applicable to guarantees and security, and entails registration costs ranging from approximately USD17 to USD3,650 (depending on the amount of the loan and on the place where the registration is made).

Other procedures may be necessary regarding specific forms of security, see below.

Mortgages

Mortgages are perfected by registration before the Real Estate Registry Office of the place where the real estate is located.

Fiduciary ownership

Fiduciary ownership is a special transfer of ownership as security of a debt. While the debtor maintains possession of the asset, ownership is temporarily transferred to the creditor until the debt is repaid.

Fiduciary ownership over real estate. Security is perfected by registration before the Real Estate Registry Office of the place where the transferred properties are located.

Fiduciary ownership over movable property. Case law has established that this type of fiduciary ownership is regulated under two different legal regimes:

- The Civil Code, applicable when the fiduciary creditor is an individual or a legal entity, whether resident in Brazil or abroad.
- Law No. 4,728/65, applicable only when the fiduciary creditor is an institution locally licensed to operate in the Brazilian financial and/or securities market.

(*Credit Contestation - Classification of credits in the action No. 0015946-47.2016.8.26.0100. Judged on 7 February 2017.*)

The Civil Code requires the fiduciary ownership over movable property to be registered before the Registry of Deeds and Documents with jurisdiction over the main office of the debtor. Fiduciary ownership governed by Law No. 4,728/65, on the other hand, does not depend on registration for its creation (as indicated by Brazilian leading case law, for instance in *Superior Court of Justice decision in the appeal No. 1.444.873, dated 10 May 2018*). However, the registration of any fiduciary ownership established by Law No. 4,728/65 before the Registry of Deeds and Documents is advisable in order to eliminate risks arising from court decisions different from the conclusion above and to ensure the enforceability of the security created.

Pledges

Pledges create a security interest over movable property, such as accounts, quotas, receivables or equipment. As a general rule, pledge agreements must be registered before the Registry of Deeds and Documents of both the creditor and the debtor (or of any of them that is resident in Brazil). Pledges over agricultural machinery, harvest and industrial machinery must be registered before the Real Estate Registry Office of the place where the pledged assets are located.

Personal guarantees

Personal guarantees must be registered before the Registry of Deeds and Documents to be enforceable against third parties. The venue for registration is the domicile of the parties to the personal guarantee agreement, or of any of them that is resident in Brazil.

Fees relating to fiduciary ownership, pledges and personal guarantees

The registration fees for these types of security are calculated based on the value of the secured assets or underlying loans, and can be substantial. Maximum fees in the State of São Paulo are, approximately:

- USD3,650 for the registration of personal guarantees, fiduciary ownership or pledges in the competent Register of Deeds and Documents.
- USD34,100 for the registration of pledges or fiduciary ownership before the competent Real Estate Registry Office.
- USD34,100 per real property mortgaged for the registration of a mortgage before the Real Estate Registry Office.

Fees are doubled when, under the rules mentioned above, registration must be undertaken in the domiciles of both the debtor and the creditor.

Notary fees may have to be paid when a notary is required for drafting the security instrument or acknowledging signatures in it (see *Question 5*).

10. Are there any matters which would normally form part of the practicalities of signing and drawdown and which are specific to your jurisdiction?

Before a facility agreement is registered in Brazil, all the pages of each counterpart are normally initialled by the parties. This is not a legal requirement but it avoids potential queries from the registrar offices. For example, the registrar officer may want to confirm that the document being registered was indeed signed by all parties indicated therein. This is easier to prove when the pages are initialled by the parties to the agreement.

Checklist, Drawdown condition (CP): Cross-border

11.Are CP checklists utilised in your jurisdiction? If so, what would a typical CP checklist look like and, in relation to a borrower (or guarantor or security provider) incorporated in your jurisdiction, what items would normally be included?

It is more common to include clauses describing drawdown conditions within finance agreements themselves than to use separate CP checklists.

Typical facility agreements governed by Brazilian law contain fewer drawdown conditions than those covered by common law. They may include:

- Representations and warranties being correct at the time of disbursement.
- No event of default or potential default having occurred.
- Corporate acts and authorisations of the borrower required for the loan.
- Financial statements of the borrower for the most recently ended financial year.
- Due execution of security agreements in connection with the loan.

As to drawdown conditions in a facility agreement involving a Brazilian borrower or guarantor and a non-Brazilian lender, they would as a rule follow the *Checklist, Drawdown condition (CP): Cross-border*, amended as follows:

- The drawdown conditions included in the following paragraphs of *Checklist, Drawdown condition (CP): Cross-border* are usually checked before signing, and, as a result, they should be moved to *Checklist, Loan facility agreement signing: Cross-border*:
    - paragraph 1 to paragraph 3;
    - paragraph 10 and paragraph 12; and
    - paragraph 18 to paragraph 20.

- Paragraph 9 of *Checklist, Drawdown condition (CP): Cross-border* should read as follows: "Signed and registered releases of existing security, when required by new lenders". Under Brazilian law, different pledges and mortgages over the same assets are acceptable. In such a case, the first secured lenders will have priority to enforce their security. This subordination of claims may or may not be acceptable for the new lenders, which may request the borrower to release some of the existing (and, accordingly, prior-ranking) security.
- Evidence of completion of electronic registration by the borrower of inbound loans (that is, loans from a non-Brazilian lender to a Brazilian borrower) with the Central Bank of Brazil to enable remittance of principal, interest and other loan amounts.
- Presentation of finance documents (such as those listed under paragraph 14 to paragraph 17 of *Checklist, Drawdown condition (CP): Cross-border*) duly notarised, consularised (that is, authenticated by a consular official of Brazil) or apostilled, translated into Portuguese and registered with all competent registry offices after signing.
- Filing of guarantees and security agreements with public registries (which, depending on the type of agreement, may be required to create the guarantee or security agreement, or to give it legal effect against third parties or allow it to be admitted as evidence in the Brazilian courts, see *Question 9*).

12. Are there any items which are typically included in a CP checklist in your jurisdiction but which would not normally be listed within a facility agreement, and if so what are they?

No.

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