Preliminary documents (loan financing) Q&A: Brazil

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Country Q&A | Law stated as at 31-Jan-2021 | Brazil

This Q&A provides country-specific commentary in relation to *Practice note: Preliminary documents (loan financing): Cross-border*. It provides background and information which will assist with preparation of a Brazilian-law confidentiality agreement based on the *Standard document, Confidentiality agreement: Cross-border* and a Brazilian-law term sheet based on *Standard document, Term sheet: syndicated acquisition finance facilities: Cross-border*

Confidentiality agreement

1. How frequently do you find that confidentiality agreements are put in place in your jurisdiction in the context of proposed loan facilities?

In the context of proposed loan facilities, confidentiality clauses within finance agreements themselves are more frequent than separate confidentiality agreements.

In the case of a lender that is a financial institution authorised by the Central Bank of Brazil to operate in Brazil, legal obligations concerning the confidentiality of its operations and services provided are already legislated for by the Brazilian Bank Secrecy Act (*Complementary Law No 105, dated 10 January 2001*).

In the case of a lender that is a foreign financial institution operating outside Brazil, the Bank Secrecy Act does not apply, so confidentiality clauses and agreements tend to be more common.

2. In the context of a proposed loan facility, would contractual obligations on the lender, set out in a confidentiality agreement, not to disclose confidential information supplied by the borrower, restricting the making of copies and the method of storage of the information, and requiring the return or destruction of papers and materials, be enforceable obligations?

If the lender is not a financial institution authorised to operate in Brazil, the contractual obligations described in the question are enforceable. However, there is a limitation, namely that information indicating unlawful activity on the part of the disclosing party must not be kept confidential (*Appeal No. 0137255-11.2011.8.26.0100 of the Court of Justice of São Paulo, decided on 15 May 2015*).

If the lender is a financial institution authorised to operate in Brazil, the obligations described in the question would again be valid. However, confidentiality of information and, therefore, the existence of those obligations would be subject to a wider list of exceptions contained in the Brazilian Bank Secrecy Act, including:

- Exchange of information among financial institutions regarding records of its clients, including the exchange of information through risk control centres and credit protection services.
- Communication of illegal acts to competent authorities, including the provision of information and data relating to transactions involving proceeds of crime. This includes, without limitation, unlawful acts of financial institutions.
- Disclosure of confidential information to investigative commissions of the federal legislative branch.
- Disclosure of information to the Central Bank of Brazil, the Brazilian Securities Commission and tax authorities when these entities exercise their supervisory powers.

There are also restrictions on contractual obligations not to disclose confidential information, restricting the making of copies and the method of storage of the information, and requiring the return or destruction of papers and materials owing to local money laundering laws applicable to Brazilian financial institutions. These laws require the preservation of documents relating to transactions in cash above minimum thresholds (presently around USD9,000) as well as documents relating to transactions deemed suspicious in terms of money laundering or terrorism financing. These rules impose a requirement that records of a financial institution's clients and transactions be kept for a minimum of ten years, therefore prohibiting the destruction of that information.

The regime described in this answer applies irrespective of whether the confidentiality agreement is governed by the laws of Brazil or of the place of residence or business of the borrower.

Standard document, Confidentiality agreement (loan financing): Cross-border complies with these rules, as it provides for an exception to the obligation to destroy information in cases where it must be stored according to Brazilian law or destruction would prevent the delivery of information required by Brazilian authorities.

3. Would contractual obligations set out in a confidentiality agreement which is governed by the law of your jurisdiction be additional to legally imposed obligations of confidence (such as banker-customer confidentiality obligations), or would they replace them?

Contractual obligations set out in a confidentiality agreement would be additional to legally imposed obligations of confidentiality, rather than superseding those obligations.

4. What types of information (i) cannot, under the law of your jurisdiction, be protected by a confidentiality agreement or (ii) are usually excluded from the definition of confidential information contained in a confidentiality agreement governed by the law of your jurisdiction?

There are no laws imposing limits on the types of information protected by a confidentiality agreement. However, in some cases information cannot be kept confidential and must be reported to competent authorities according to applicable laws or court orders (see *Question 1*).

Information expressly excluded from the obligation of confidentiality in agreements under Brazilian law is information that is:

- Generally available to the public.
- Evident for a person with technical knowledge on the subject.
- Independently acquired by lawful means by a party without communication from the other party.

5. Is information which is held electronically treated differently from information on paper under the law of your jurisdiction?

No.

6. Can findings, data or analysis derived from confidential information itself constitute confidential information under the law of your jurisdiction?

Yes, findings, data or analysis derived from confidential information can itself constitute confidential information, provided this is expressly indicated in the confidentiality agreement.

7. Is an undertaking by a lender not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available, enforceable?

Yes, the undertaking not to disclose the fact that a confidentiality agreement has been entered into or that confidential information has been made available constitutes an enforceable obligation.

8. Is it necessary for "consideration" (that is, value, of some kind) to be given by a borrower in order for a confidentiality agreement to be binding on a lender under the law of your jurisdiction? If so, does agreement by the borrower that it will provide confidential information after a confidentiality agreement has been entered into constitute such consideration?

It is not necessary for a borrower to give consideration for a confidentiality agreement to be binding on a lender. Even if there were such a requirement, the supply of confidential information might be regarded as consideration.

9.What are the remedies available in your jurisdiction in the case of a breach, or an anticipated breach, of obligations set out in a confidentiality agreement, or confidentiality obligations imposed by the general law of your jurisdiction?

In the case of a breach of obligations set out in a confidentiality agreement, the injured party can file a civil lawsuit against the other party to demand payment for any loss and damages arising from the breach, plus interest, monetary reinstatement and attorneys' fees.

In the case of anticipated breach, the injured party may require specific performance of the confidentiality agreement, leading to the issue of a court order restraining communication of the information, the breach of which may lead to a criminal conviction and a fine.

A breach of confidentiality obligations may also give rise to criminal penalties if the party in breach is a financial institution or if the confidential information can be used for commercial gain. In this case, the injured party may itself start a criminal prosecution before the Brazilian courts (for example, proceedings in connection with unfair competition crimes).

10. Does the law of your jurisdiction impose a limit on the time during which the obligations set out in a confidentiality agreement may continue to apply?

No, Brazilian law does not impose a specific limit on the time during which the obligations set out in a confidentiality agreement may continue to apply. However, there are judicial decisions stating that the imposition of a time limit (to be determined in the agreement) is a requirement for the validity of a confidentiality agreement (see *Civil Appeal No. 0030463-31.2003.4.03.6100/SP, from the Federal Court of Appeals of the 3rd Region, decided on 1 February 2016*). (For a limit on the duration of the confidentiality agreement, see *Standard document, Confidentiality agreement (loan financing): Cross-border: clause 11*.)

11. What would be the typical list of permitted disclosees in a confidentiality agreement governed by the law of your jurisdiction?

The typical list of permitted disclosees, similar to the list contained in *Standard document, Confidentiality agreement (loan financing): Cross-border*, would be as follows:

- Officers and employees of the recipient of the information or of any member of its group.
- Professional advisers or consultants engaged to advise the recipient in connection with the loan.

Persons agreed in writing by the parties may receive the confidential information.

12. What would be the typical list of situations under the law of your jurisdiction in which a lender might be compelled to disclose confidential information supplied by a borrower (and which should therefore form express exceptions to an undertaking to keep them confidential)?

For the situations in which a lender might be compelled to disclose confidential information, see *Question 2*.

Standard document, Confidentiality agreement (loan financing): Cross-border: clause 5 would be applicable in Brazil.

13. Would undertakings not to entice away officers or employees or not to solicit customers of the disclosing party be enforceable?

Yes, these types of clauses are enforceable, such as the undertakings not to entice away officers or employees, or not to solicit customers of the disclosing party. However, these clauses require reasonable limitations on the time period.

14. Could members of the borrower's group enforce a confidentiality agreement, without being parties to the agreement?

No, members of the borrower's group cannot enforce a confidentiality agreement without being parties to the contract. However, if the borrower decides to enforce a confidentiality agreement, members of the borrower's group can assist the claimant in that action by providing information and allegations in the court proceedings.

There is one exception to the above, in that the agreement may reserve to third parties, including other companies in the borrower's group, the right to enforce on the agreement. In such a case the obligation will be valid (see *Standard document, Confidentiality agreement (loan financing): Cross-border: clause 8.2*).

15. Could a borrower enforce a confidentiality agreement under the law of your jurisdiction against permitted disclosees, without those disclosees being parties to the agreement?

The borrower cannot enforce a confidentiality agreement against third parties, since they are not subject to obligations under its provisions.

However, the borrower can file a criminal lawsuit against the permitted disclosees under Brazilian intellectual property law, which prohibits the non-authorised disclosure, exploitation or use of confidential information obtained from contractual or employment relationships. The borrower may also initiate a liability suit based on the same grounds.

16. Does a written confidentiality agreement which is governed by the law of your jurisdiction need to be signed by all the parties on one and the same document? If not, what procedure needs to be followed if signature of separate (but identical) documents is to be effective?

No, the confidentiality agreement does not need to be signed on one and the same document by all parties. The validity of the declaration of a party to commit itself under a confidentiality agreement does not depend on a specific signing procedure under the Brazilian Civil Code.

A signature placed on an agreement outside Brazil must, however, 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 placed in a country covered by the Hague Convention, the signature must be apostilled. The document must also be translated into Portuguese by a sworn translator and registered before the Registry of Deeds and Documents. The agreement will only have legal effect in relation to third parties and be admitted as evidence in the courts in Brazil if these procedures are observed.

17. Under the law of your jurisdiction, can the law chosen as the governing law of a confidentiality agreement restrict the parties' choice of law in respect of the subsequent transaction documents?

No, the governing law of the confidentiality agreement cannot restrict the choice of law for the subsequent transaction documents. Under mandatory conflict of laws rules, an agreement is governed in Brazilian courts by the law of the place of their actual signature. In the case of agreements signed by each party in a different country, the law of the country in which the last signature was placed on the agreement should govern the agreements.

Term sheet

18. Would a fairly detailed term sheet normally be contractually binding? Is there anything specific (for example, by way of labelling, express qualification or content) which can prevent such a term sheet from being binding or, conversely, anything specific which can make it legally binding?

A fairly detailed term sheet would normally be contractually binding under Brazilian law. To prevent such a term sheet from being binding, the document must expressly indicate that it does not constitute or imply a commitment to sign any loan agreement (see *Standard document, Term sheet: syndicated acquisition finance facilities: Cross-border*). Conversely, to make sure that a term sheet is legally binding, that document should expressly specify that, once it is signed, the parties will have the right to demand the signing of a loan agreement.

19. Where a term sheet is contractually binding under the law of your jurisdiction, how does your law deal with those points which would be covered in a detailed facility agreement and which do not appear in the term sheet?

As a general rule, points that are not covered by the term sheet do not create obligations on the parties. The basic rule for a binding term sheet is that points not covered would be deemed not negotiated and should not be included in the detailed facility documents. Exceptions to this rule exist as follows:

- In certain specific cases, rules relating to a specific relationship are imposed by Brazilian law unless superseded by contractual provisions (for instance, where default interest is not agreed it will be fixed according to the Brazilian Civil Code).
- In cases in which the lack of determination would deprive the term sheet of legal effect, the parties should determine in good faith the content that is lacking (for instance, in a case where the term sheet does not mention the level of interest, parties should set it on market terms).

20. Where there is a duty to negotiate terms in good faith under the law of your jurisdiction, what does that duty entail, and what are the possible sanctions for breach of that duty?

A duty to negotiate in good faith exists whenever a lack of determination of terms in the term sheet would prevent the document from having legal effect (see *Question 2*). The duty to negotiate terms in good faith creates general liabilities, such as the correct provision of information by the parties, collaboration and loyalty during the negotiation of an agreement. Whenever the duty exists, the parties should carry out those negotiations to market standards or previous negotiation standards, as the context may require.

Possible sanctions for breach of that duty are the payment for any loss and damages, plus interest, monetary restatement and attorney's fees.

21. Can a term sheet be partially binding and partially non-binding under the law of your jurisdiction? If so, how should that be achieved?

Yes, a term sheet can be partially binding under Brazilian law by expressly stating in the term sheet which clauses are binding and which are not.

22. Does the amount of detail contained in a term sheet affect the requirements (if any) imposed by the law of your jurisdiction on the parties, whether or not the term sheet is binding, as regards their conduct in negotiating the detailed finance documents?

Whether or not a term sheet is binding depends on the intention of the parties to create or not to create binding commitments, and not on the amount of detail contained in the term sheet. If the parties determine that the clauses of a term sheet are mandatory, those clauses will be considered as such. (For issues arising from a lack of sufficient detail, see *Question 2*.)

23. Would a term sheet typically be discussed and adjusted between the lender and the borrower, and then finalised, or would it typically be accepted by the borrower once issued by the lender (subject to any points agreed separately between them)? Does the position vary according to the circumstances in each case?

A term sheet is typically discussed and adjusted between the lender and the borrower, but the procedure can vary according to the circumstances of each case and depending on how urgent the deal may be for each of the parties.

24. Would a term sheet typically be signed by the parties, or not, and would such signing have any specific legal effect?

The parties typically sign a term sheet. Although the signing of a term sheet makes it easier for the parties to prove the existence of the obligations undertaken, the validity of a declaration by a party to commit itself under the term sheet does not depend on the signing of the document and the obligations undertaken can be proved in other ways, such as by way of witness statements.

25. Would you refer, in a term sheet drafted by you, to the conditions which need to be satisfied before a borrower can draw down a loan as "drawdown conditions" or "conditions precedent"?

In Brazil the conditions would be referred to as "drawdown conditions".

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