Corporate loan facilities Q&A: Brazil

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This Q&A provides country-specific commentary on *Practice note, Corporate loan facilities: Cross-border*.

Corporate loan facilities

1. Is there any general prohibition under the law of your jurisdiction on the lending of money by one company to another company (or other legal entity), with interest charged on the amount borrowed, and with an entitlement for the lender to call for early repayment of the loan in certain agreed circumstances?

No general prohibitions exist, but there are two specific restrictions that should be noted:

- If the lender is a Brazilian resident but not a financial institution authorised to operate in Brazil by the Central Bank, the raising of funds from third parties followed by lending with interest charged on the amount borrowed on a regular basis for profit is not allowed. These transactions are considered as financial intermediation under Brazilian law, and the persons engaged in this activity would be subject to criminal liability. This restriction does not apply to foreign lenders (see *Question 10*).
- While lending of money between a lender and a borrower that are related or associated companies is generally allowed, financial institutions operating in Brazil cannot grant loans or advances of any kind to certain related entities or persons, except if the operation is undertaken at arm's length, among other exceptions.

2. Are there any mandatory requirements relating to the layout or contents of a loan facility agreement governed by the law of your jurisdiction between two companies or other legal entities, and are there any particular signing, witnessing or notarisation requirements for a loan facility agreement?

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There are no mandatory requirements relating to the layout or contents of a loan facility agreement between two companies or other legal entities, apart from the description of the parties, value of principal and interest rate. There is likewise no need for a promissory note.

There are no particular signing, witnessing or notarisation requirements for loan facility agreements. However, 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 placed in a country that is a signatory to the Hague Convention, it must be apostilled. Foreign loan facility agreements must also be translated into Portuguese by a sworn translator and registered before a Brazilian Registry of Deeds and Documents. The agreement will only have legal effect in relation to third parties and be admitted as evidence before courts in Brazil if these procedures are observed.

3. Is a loan facility agreement which is governed by the law of your jurisdiction binding on a lender once it has been signed if there are drawdown conditions which still need to be satisfied? What are the drawdown conditions (also referred to in some jurisdictions as conditions precedent) commonly set out in a facility agreement which is governed by the law of your jurisdiction?

The agreement may be binding from the moment of signature in relation to its general clauses (obligation to appoint representatives, form committees and so on). However, the lender will not be obliged to disburse any amount under the loan facility agreement if there are drawdown conditions which still need to be satisfied.

Typical conditions precedent in a facility agreement governed by Brazilian law are much more restricted 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.
- Legal opinions from relevant advisors being issued.
- Financial statements of the borrower for the most recently ended financial year.
- Due execution, translation and registration of security agreements in connection with the loan.
- Evidence of electronic registration of the transaction with the Central Bank Information System to enable remittance of principal, interest and other loan amounts (which must be obtained by borrower before the inflow of financial resources).

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4. Is there typically any restriction on the borrowing powers of a company incorporated under the law of your jurisdiction (or its officers), and can any such limit affect the rights of a lender?

As a general rule, companies incorporated under Brazilian law have no legal restrictions on their borrowing powers. However, their bye-laws or articles of association may limit the maximum amount of the loans or impose requirements for execution of loans, requiring, for example, approval by the shareholders or execution by the directors.

Lack of compliance with these requirements may impair the rights of a lender. That said, there have been cases in which the lenders have successfully argued that they could not have reasonably been expected to be acquainted with the internal restrictions in the borrowers' bye-laws, and should therefore have their claims upheld. This would typically happen when the facts and conditions surrounding the execution of a facility agreement created the appearance that these limitations did not exist or were not violated. In other words, the rights of the lender cannot be affected in the situation where a reasonable third party would consider that an agent had authority or capacity to commit under a facility agreement.

5. Are the lender's rights affected if the borrower applies the funds (directly or indirectly) to an illegal purpose and, if so, in what circumstances?

Generally not, although an exception might exist in circumstances in which the lender knowingly profits from the illegal activities, for example by setting the interest rate in a threshold that is not fixed at arm's length, aiming to share in the illegal profits.

In the absence of illegal activities, there are no particular purposes for which loans may not be made.

6. Is approval from the shareholders or members of a borrower incorporated under the law of your jurisdiction required for a normal loan facility agreement?

Brazilian law does not require approval from the shareholders or members of a borrower for a normal loan facility agreement. However, the borrower's bye-laws or corporate documents may require this approval, particularly for high value loans.

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7. Are any restrictions applied or incentives (other than tax incentives) provided to foreign lenders, and are there any significant costs which foreign lenders are more likely to incur than domestic lenders in relation to the grant of a loan facility, a guarantee, or security over assets? Are these restrictions or incentives different depending on whether the foreign lender is incorporated or authorised in an EU member state or a non-EU country?

There are no restrictions applied to foreign lenders in relation to the grant of a loan facility or security over assets.

If the parties decide to submit claims arising from the facility agreement to a foreign jurisdiction, enforcement is only possible if the Brazilian Higher Court of Justice recognises foreign court awards from that jurisdiction. A foreign lender would need to apply to the Brazilian Higher Court of Justice to have a foreign court order enforced in Brazil.

A non-tax related incentive provided to foreign lenders is that, except as otherwise agreed by the lender, if the borrower undergoes court supervised judicial recovery procedures, the corresponding obligation will be indexed to changes in the exchange rate, whatever the other decisions of the general meeting of creditors may be. The same rules apply whether the foreign lender is incorporated or authorised in an EU member state or non-EU country.

Another cost which may apply to foreign lenders is the bond for suing in Brazil. In a court procedure, any claimant who resides abroad or leaves the country during the course of the procedure must post a bond covering costs and legal expenses incurred by the other party (except if the claimant owns real estate property in Brazil to assure the payment). The bond is not required for enforcement proceedings based on an extrajudicial title, for the enforcement of court decisions, for the filling of counterclaims and in case an international treaty so releases. The bond for suing in Brazil is dispensed with for claimants located in certain European countries due to bilateral agreements entered into with Brazil by countries such as France (*Decree No. 3,598, dated 12 September 2000*) and Italy (*Decree No. 1,476, dated 2 May 1995*).

8. Is the concept of an agent acting (in relation to a loan facility agreement) on behalf of a group (syndicate) of lenders recognised in your jurisdiction?

Brazilian law specifically recognises the concept of an agent acting on behalf of a group of creditors in certain types of financing transactions in the capital markets, including the issuance of debentures and trade of securitised agribusiness receivables (CRA) or real estate receivables (CRI). Brazilian law also expressly recognises these arrangements in other types of capital markets transactions, such as the public issuing of promissory notes, but not (expressly) in case of loan facility agreements.

Although there is no similar and express reference to agents acting on behalf of a syndicate of lenders in Brazilian law, the concept is also acceptable in the country and such an agent will be considered as an attorney-in-fact of the other lenders before third parties. An agent appointed under a law other than Brazilian law would equally be recognised as having that capacity.

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The powers and duties of the agent are defined in the facility agreement, but there are some general rules governing the activity of attorneys-in-fact which are also applicable to agents. Those rules basically require diligence in the execution of the mandate and an indemnity for damages caused by the agent or by the parties to whom the agent delegated its powers.

If the lenders are financial institutions authorised by the Central Bank to operate in Brazil, the confidentiality of their operations and the services provided is a legal obligation as determined by the Bank Secrecy Act.

The appointment of agents for syndicates of internal financial institutions (that is, financial institutions authorised by Brazilian Central Bank and operating in Brazil) is not common at the time of writing. This is because high value loan facilities tend to be granted by government organs such as the development bank BNDES (Banco Nacional de Desenvolvimento Econômico e Social), rather than by bank syndicates requiring agent representation. Even though public resource expenditures have fallen since 2015, funds from public banks, and specifically from BNDES, are still important sources of capital for Brazilian companies.

9. Where there is a group (syndicate) of lenders, can security be granted by the borrower to someone (a trustee or equivalent) who holds the security rights and deals with them on behalf of the group?

Security can be granted by the borrower to someone who holds the security rights and deals with them on behalf of the syndicate of lenders. In such a case, the agent who executes the security agreement acts as an authorised representative of the lenders.

Such a representative may have powers and duties set out in the facility agreement or security document, in addition to those set out in the applicable law (see *Question 8*). It is also important to mention that, regardless of the provisions set out in the facility agreement or security document, the enforcement of security agreements does not allow the creditor or the agent to hold the asset granted. Instead, the agent must sell the asset and apply the proceeds towards satisfaction of its receivables and collection expenses, returning the excess to the debtor.

Any lender can be appointed as authorised representative or security agent, but typically the lender appointed is the one with the highest participation in the syndicate.

10. Are there restrictions on the making of loans by foreign lenders, or on the granting of security (over all forms of assets), or by way of guarantees, to foreign lenders? What is the position if a company (or other entity) which is subject to a restriction makes a loan in breach of that restriction?

There are no restrictions on the making of loans by foreign lenders (regardless of whether they are banks or non-banks), since lending to Brazilian persons or companies in itself does not constitute an activity dependent on the authorisation of the Brazilian Central Bank. However, the making of loans by foreign lenders to Brazilian Public

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Entities (as governmental bodies) depends on regulatory procedures set forth in Complementary Law No. 101, of May 4, 2000 (*Lei de Responsabilidade Fiscal*), which are intended to control the indebtedness of the public sector.

There are no legal restrictions on the granting of security (over all forms of assets), or by way of guarantees, to foreign lenders. One exception is a traditional form of security called fiduciary assignment (*alienação fiduciária*) which leads to transfer of ownership of assets to the creditor, with such transfer to be automatically revoked upon payment of the debt. This has traditionally been denied to non-Brazilian creditors as the security was created by legislation referring to the Brazilian financial system alone. This denial has scarce practical relevance, however, since more recently the Brazilian Civil Code has created a form of fiduciary security with the same characteristics of the fiduciary assignment, called fiduciary ownership (*propriedade fiduciária*). This is intended to benefit all lenders, Brazilian and foreign, without exception. The possibility of foreign financial institutions that are not authorised to operate in Brazil benefitting from fiduciary ownership has been confirmed in a recent court case (*Appeal No. 2078905-92.2017.8.26.0000, judged in October 2017 by Hamid Bdine, Cesar Ciampolini and Carlos Dias Motta*). We consider that this judgment is correct and should prevail in future cases.

In addition, Law No. 13,986 of April 7, 2020 expressly permitted the granting of security over rural lands in favour of foreign creditors, extinguishing any doubts that could previously arise in connection with the enforceability of that kind of security.

11. Can any laws of general application affect the validity of a loan, a guarantee or security over assets (or the terms on which they are made or agreed)?

Yes, laws of general application may affect the validity of a loan, a guarantee or security over assets and the terms on which they are agreed.

Rules affecting validity of loans or their terms

According to general corporate governance rules, loans should be made at arm's length. Transactions benefitting affiliated, parent or controlled companies or managers of lenders, and not abiding by market terms, are the classical example of non-arm's length transactions. In addition, loans made by an entity to its officers or managers must have the prior authorisation of the general meeting of shareholders.

Moreover, interest rates in loans by non-financial entities operating in Brazil are limited by the Brazilian Civil Code (see *Question 13*).

Rules affecting the validity of a guarantee or security or their terms

The granting of security or guarantees by a Brazilian financial institution in relation to debts of its controlling shareholders and other linked persons is subject to the same restrictions to loans as those set out in *Question 1*.

Other causes of invalidity

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The validity of security and guarantees may also depend on the fulfilment of registration, notarisation and apostille or legalisation requirements, which can vary depending on where the agreement was executed, the details of the security or guarantee and the assets granted under such security or guarantee (see *Question 27*). The physical location of the asset over which security is granted does not affect the validity of the security.

12. Are there any legal restrictions relating to repayment of a loan by instalments, or relating to voluntary early repayment of a loan?

There are no legal restrictions relating to the repayment of a loan by instalments. As a general rule, the debts must be paid when matured, but early repayment can be made if agreed by the parties.

However, borrowers have the right to early repayment independent of the consent of the lender in each of the following circumstances:

- When the lender is a financial institution authorised by the Brazilian Central Bank and the amount borrowed by an individual is refinanced by another financial institution.
- In case of debts secured by pledges or mortgages, in which case the minimum payment must be equal to or higher than 25% of the initial value of the debt, if so required by the lender (whether or not the lender is a financial institution).
- When the Brazilian Consumer Code is applicable to a specific loan (case law tends to apply the Brazilian Consumer Code where there is an economic inequality between the parties). This applies whether or not the lender is a financial institution.

No amendment is necessary to *Standard document, Facility agreement (intra-group): Cross-border: clause 7.1* to reflect the Brazilian legal position.

13. Are there any legal restrictions on the accrual or payment of interest, or on fees payable by the borrower to the lender? If so, how are they typically dealt with by lenders and borrowers?

Brazilian law does not impose specific limits on the interests or fees charged by financial institutions authorised to operate in Brazil, except for interest charged on bank overdraft granted to individuals or micro-entrepreneurs. This general rule is however subject to the limitation that the Superior Justice Court has decided that excessive rates may be refused based on general equitable principles, excessiveness being determined based on economic factors such as inflation, market default rates and monetary policy (*Superior Justice Court, Special Appeal No. 407.097, judged on 12 March 2003*).

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There are no restrictions on the interests and fees charged by foreign lenders that lend money to Brazilian companies but do not operate in Brazil.

The interest rates set by lenders located in Brazil that are not financial institutions, however, are limited to the rate currently in force for the payment of overdue taxes owed to the National Treasury (*Decree No. 22.626, from 1933*). This rate can be the Selic rate (currently 2% per year) or 12% per year under Brazilian case law.

An agreement for accrual of interest on the basis of a year of 360 days is enforceable under Brazilian law.

An agreement for the accrual of interest at a rate which is dependent on LIBOR is permissible in strict legal terms. However, the possibility that a court will decide otherwise cannot altogether be excluded, since Brazilian courts have already prohibited the use of a similar market floating rate in internal loan transactions, on the grounds that it was indirectly fixed by the lenders themselves.

14. What provisions are permissible in order to cover the eventuality that the wholesale financial markets are disrupted and that as a result, in particular, the method agreed by the lender and the borrower for calculating the interest rate does not work (or produces an inappropriate result)?

Loan agreements usually provide for a second and subsidiary method for calculating the interest rate in case the principal method is inapplicable, this is expressly permitted by regulation for financial institutions. The same practice may also be adopted by non-financial institutions. In the absence of such provision, a general fairness clause in Brazilian law would oblige the parties to negotiate a replacement method in case the original interest rate cannot be applied due for example to its extinction.

Different considerations apply if the method chosen by the parties, either originally or as a replacement, produces an inappropriate result due to market disruption. Then, it is necessary to verify whether there is excessive burden on one of the parties. If the answer is affirmative, interest can be reviewed and adapted in a court procedure under the Brazilian Civil Code, even in the lack of an express provision to this effect.

15. If a facility agreement is governed by the law of your jurisdiction, should the matters which are covered by representations also be described in the agreement as being "warranted"?

While there is no equivalent term to warranties in Brazilian legal usage, the term can be kept and will be understood as meaning a statement regarding facts that are material to the parties' decision to enter into the loan.

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16. What are the appropriate accounting standards to be applied to borrowers who are incorporated in your jurisdiction?

Brazil adopts the IFRS system of accounting. The Committee of Accounting Pronouncements (Comitê de Pronunciamento Contábil) is responsible for adapting and implementing the IFRS for Brazil.

17. Are there any restrictions on the types, duration or geographical scope of undertakings which can be given by the borrower to the lender in a facility agreement?

There are no specific restrictions on the types, duration or geographical scope of undertakings which can be given by the borrower to the lender in a facility agreement. However, there are two general restrictions on the undertakings which can be provided for in those agreements:

- Clauses which make the validity of an agreement subject to the discretion of one party are void under the Brazilian Civil Code.
- Clauses imposing unbalanced obligations on the borrower that are not justified by the context of the agreement are not acceptable under Brazilian law (for example, a financial covenant clause requiring the borrower to maintain certain financial indicators after the full repayment of the loan).

18. Can an undertaking contained in a facility agreement or security document not to grant security to any other creditor (a "negative pledge") be enforced against and affect the rights of third parties?

The rights of a third party cannot be affected by the existence of a negative pledge, whether or not they were aware of it. The negative pledge operates under privity of contract rules exclusively among the parties agreeing to it, and thus cannot interfere with the validity of rights of third parties.

19. Can a lender be liable under environmental laws for the actions or omissions of a borrower, guarantor or security provider?

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The lender's environmental liability is a controversial subject in Brazil, and there is no consensus on that matter so far.

As a rule, lenders cannot be held liable for damage caused by borrowers, guarantors or security providers, since they are not responsible for the activities of their clients. There may be an exception if the financial institution is subject to Brazilian laws and fails to comply with regulations requiring it to:

- Verify whether the borrower is enrolled with the proper environmental registry before the granting of any agricultural loans or loans aimed at genetically modified organisms' projects or activities.
- Adopt adequate criteria to evaluate financial risks before extending any financing. This obligation is set out in regulations issued by the CMN (*Resolution CMN No. 4,327/2014*).

Lenders can protect themselves by adding provisions determining the acceleration of the loan if the lender fails to comply with environmental matters and this is independently detected by an environmental agency.

Another exception, based on case law of the Brazilian Higher Court of Justice, is that the lender may be held liable for environmental damages to real estate, if the lender acquires full ownership of the real estate as a result of the enforcement of the fiduciary assignment security created over it.

Lenders can seek indemnification for losses incurred as a result of unlawful actions or omissions of borrowers, guarantors or security providers (*Article 927, Brazilian Civil Code*).

20. If a borrower agrees to procure that a subsidiary incorporated in your jurisdiction acts or refrains from acting in a particular way, can such an undertaking be enforced by the lender? What would be a typical definition of a subsidiary company, for use within a facility agreement?

The undertaking can be enforced by the lender against the borrower but not against the relevant subsidiary unless the latter is also a party to the agreement.

The typical definition of a subsidiary company would be a company directly or indirectly controlled by a holding company, where "control" means either of the following:

- The direct or indirect ownership of 50% or more of the voting interest in, or a 50% or more interest in the income of, such company, corporation or other entity.
- The power, pursuant to law or contract, to elect the majority of the directors (statutory officers or board of directors), and to effectively use powers to conduct the corporate activities of such company.

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21.Are there currency exchange controls which restrict payments to a foreign lender or in a foreign currency under a facility agreement, security document or guarantee?

Payments to foreign lenders in foreign currency are allowed under facility agreements and associated security or guarantee documents without limitation on the amounts involved. However, these payments, if made from Brazil, must both be:

- Carried out through an institution authorised to operate in the exchange market and comply with other foreign exchange requirements in Circular No. 3,691, dated 16 December 2013, from the Central Bank of Brazil.
- Registered electronically on the Brazilian Central Bank Information System (Sisbacen) under Resolution No. 3,844, dated 23 March 2010, from the CMN.

These rules apply only where remittances are to be made through the purchase of non-Brazilian currency with funds held in Brazil.

22. Are there any limits on events which can be categorised in a facility agreement governed by the law of your jurisdiction as events of default, entitling a lender to demand early repayment? Is a provision which states that a lender is entitled to early repayment, in certain circumstances, without the need for the lender to make demand, enforceable?

There are no specific limits on events which can be categorised in a facility agreement as events of default.

Examples of acceptable entitlements in favour of a lender are those which can be exercised in the event of a "material adverse change". Where the lender is the parent company of the borrower, an undertaking by the borrower to repay the loan if the lender sells the borrower is legally valid (but see the restrictions in *Question 1*).

On the other hand, clauses setting out events of default which only occur at, or have their occurrence determined by, the pure discretion of the lender are void under Brazilian law. Also, there is a recent court decision from a lower court judge stating that an event of default such as the judicial recovery of the borrower (see *Question 25* for more details on judicial recovery mechanisms) could not validly lead to the acceleration of the loan. However, the decision has been reversed by São Paulo Court of Appeal and the risk of such a clause being considered void is still remote. In addition, in August 2018 the São Paulo Court of Appeal issued another decision accepting the acceleration of notes representing loans in case of the debtor's judicial recovery (*Appeal No. 1083297-83.2017.8.26.0100*).

A provision which states that a lender is entitled to early repayment in certain circumstances, without the need for the lender to make a demand, is also enforceable.

The lender's right to early repayment may be affected by insolvency procedures (see *Question 25*). In such cases, the lender's rights may be subject to the list of priority determined by law or by the respective recovery plan.

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23. Are there any laws in your jurisdiction affecting the right of (a) a borrower to remedy an "event of default" and/or (b) a lender to waive (that is, release) an event of default?

No. Typically, the rights of a borrower to remedy an event of default, or of a lender to waive such default, are provided for in the facility agreement.

24. Are there any restrictions on the accrual or payment of additional amounts (such as "default interest") as a result of the occurrence of an event of default? If so, how are they typically dealt with in a facility agreement?

Restrictions on interest: after default

Default interest in Brazil is limited to the rate currently in force for the payment of overdue taxes owed to the National Treasury (Selic rate or 12% per year, see *Question 13*).

Specifically in relation to Brazilian financial institutions, the limitation above does not apply, but a prohibition exists in relation to increasing normal interest after default to meet market rates, even if this is expressly agreed in the loan instrument.

If debts are secured, and are accelerated by reason of lack of payment, insolvency, or loss of value of the security, interest may only be charged in relation to already elapsed periods of time.

Penalties

When the agreement provides for a penalty clause in case of an event of default, this will cover and prevent additional liability for damages unless the agreement expressly stipulates otherwise. It is a common feature of facility agreements governed by Brazilian law to expressly provide for damages in addition to fines imposed by penalty clauses. The fines cannot exceed the value of the defaulted obligation. However, if the loan agreement is subject to Brazilian Consumer Code (case law tends to apply the Brazilian Consumer Code where there is an economic inequality between the parties), the fine cannot exceed 2% of the value of the defaulted obligation.

Typically, local facility agreements tend to recognise those rules in setting the levels of interest and fines.

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25. What would be the typical list of insolvency procedures (and similar) which would constitute events of default in the case of a borrower incorporated in your jurisdiction?

A company's bankruptcy constitutes a typical event of default under Brazilian law.

The Brazilian Bankruptcy Act provides for two recovery mechanisms for companies before a bankruptcy procedure is started, and they typically also constitute events of default under loan agreements. These are:

- **Judicial recovery.** This is a debtor in possession (DIP) proceeding whereby a court appointed administrator oversees the conduct of the business. The debtor presents a restructuring plan to the court and this plan is then voted on by creditors at a meeting. Judicial recovery is not applicable to debts subject to fiduciary security (see *Question 10*), to tax credits and to bank cash advancements made pending the future liquidation of exchange agreements.
- **Extrajudicial recovery.** In this type of recovery, the debtor strikes a deal with the creditors out of court. The debtor may then submit the deal to the court for formal approval (*homologação*). Extrajudicial recovery is not applicable to tax claims and to those claims excluded from the judicial recovery. Labour or workplace accident related claims can integrate extrajudicial recovery procedures when prior negotiation has been carried out between the debtor and the union formed by workers in that particular industry.

Financial institutions are subject to special insolvency procedures in crisis situations, which are usually considered as events of default under loan facilities. These are:

- Intervention, by means of which the activities of the financial institution are interrupted and a group of managers is appointed provisionally to attempt its recovery (that seldom happens in practice).
- Regime of Temporary Special Administration (RAET), a less restrictive form of Central Bank of Brazil (Central Bank) intervention, in which a board of officers is appointed by the Central Bank to continue running the entity's business, normally with the goal of recovery (which in practice seldom happens).
- Extrajudicial liquidation, where the Central Bank carries out the administrative liquidation of assets and payment of liabilities after appointing liquidators, following the rules generally applicable to bankruptcy.

26.Does the law of your jurisdiction provide for any kind of moratorium on enforcement of a lender's claims in the event of insolvency of the borrower? If so, does the moratorium apply also to the enforcement of security rights against entities (or individuals) other than the borrower?

In the event of judicial or extrajudicial recovery procedures, the lender's claims against the borrower (including secured claims) are subject to the payment terms stated in the recovery plan (for more information and excepted claims, see *Question 34*) and must be enforced in accordance with this plan.

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Where a bankruptcy procedure has started, the lender's claims against the borrower are subject to the order of priority defined by the Brazilian Bankruptcy Act. The start of bankruptcy procedures prevents the mortgagee and the pledgee from enforcing their respective security. The secured creditors will be paid to the extent that the bankruptcy listed assets are sufficient to satisfy the preferred creditors (according to the order of priority described in *Question 34*).

The enforcement of fiduciary security, however, is not affected by the bankruptcy or even by recovery procedures.

The moratorium will not affect security granted by entities other than the borrower benefitting from it, which continue to be valid and enforceable as though the procedures had not taken place.

27. Are any fees payable to a governmental authority on the granting or enforcement of a loan facility, guarantee or security interest, and what registrations or filings need to be made at public registries (and by whom)?

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 (see *Question 2*). The public notary's signature must be authenticated by a consular official of Brazil or, if the agreement was signed in a country covered by the Hague Convention, the signature must be apostilled. Foreign documents must also be translated into Portuguese by a sworn translator and registered before a local Registry of Deeds and Documents, including where the document is a guarantee or security executed by a non-Brazilian creditor as beneficiary. The procedure is applicable to loan agreements, guarantees and security, and entails registration costs before the Registry of Deeds and Documents ranging from approximately USD17 to USD3,650 (depending on the amount of the loan and on the place where the registration is made). Additionally, other procedures may be necessary regarding specific forms of security; these are mentioned below.

Mortgages and fiduciary ownership

Mortgages for assets over USD6,200 approximately must be created in writing by a public deed. Mortgages are perfected by registration before the Real Estate Registry Office of the place where the real estate is located.

A fiduciary ownership is a special transfer of ownership as security of a debt in favour of financial institutions (see *Question 10*). While the debtor maintains possession of the asset, ownership is temporarily transferred to the creditor until the debt is repaid. Slightly different from fiduciary ownership is fiduciary assignment (governed by Law No. 4,728/65), a traditional form of security benefitting financial and market institutions which equally leads to transfer of ownership of assets to the creditor. Under current case law, fiduciary assignment cannot benefit non-Brazilian creditors, unless its subject is real estate.

Fiduciary ownership or assignment over real estate likewise is perfected by registration before the Real Estate Registry Office of the place where the transferred properties are located. In case of chattels, registration takes place before the registrar of deeds and documents of the domicile of the debtor and, in case of vehicles, before the public body competent to license them.

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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 or, in the case of fiduciary ownership over vehicles, to be registered before the relevant vehicles registration authority. By contrast, fiduciary assignment does not depend on registration to be created (as indicated by Brazilian 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 assignment 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.

The fees for registration are calculated based on the value of the secured assets or underlying loans and can be substantial.

Pledge

Pledges create a security interest over movable property (for example, accounts, quotas, receivables or equipment). As a general rule, pledge agreements must be registered before the local Registry of Deeds and Documents, but it can vary depending on the type of assets being pledged. Rural Pledges (over agricultural machinery and harvest, for example) and Industrial and Commercial Pledges (over industrial machinery, among other properties) must be registered before the Real Estate Registry Office of the place where the pledged assets are located.

Typically, the agreement stipulates that the debtor will effect document registration and pay all connected expenses.

The fees for registration are calculated based on the value of the secured assets or underlying loans, and can be substantial.

Caveat as to registration and fees

Registration of a security or guarantee, and the corresponding fees indicated above, may be avoided whenever the following conditions are cumulatively met:

- The agreements creating the security or guarantee are not governed by Brazilian law.
- They are not expected to be enforced in Brazil, typically because the assets to which they relate or over which enforcement may take place are not located in Brazil.

28. What is the position in relation to transfers to a third party of a lender's outstanding rights under a facility agreement?

The transfer to third parties of a lender's outstanding rights is acceptable under Brazilian law.

The debtor under the assigned receivable must be notified of the assignment. If this is not done, any payment made to the original creditor by the debtor would be valid as concerns such debtor. Unless the assignment agreement

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provides otherwise, the assignor warrants to the assignee the existence of the receivable, but is not liable for the solvency of the debtor.

If the assignor is a financial institution authorised to operate in Brazil, the assignment must also meet regulatory requirements. These apply only when the assignee is not a regulated financial institution. The requirements are the following:

- Consideration for the assignment must be paid immediately upon the assignment.
- Information about the assignment must be made available to the Central Bank and be disclosed in the assignor's financial statements.
- There shall be no recourse against the assignor in case of default by borrower.
- There shall be no repurchase of the assigned claims.

If an assignment is made from a financial institution authorised to operate in Brazil, to a credit securitisation company, the two latter restrictions in the bulleted list above do not apply. However, the repurchase of the assigned claims is only authorised upon immediate payment.

If an assignment is made from a financial institution authorised to operate in Brazil, to a credit securitisation investment fund, the two latter restrictions mentioned above do not apply as well. The assignor or entities related to it cannot invest in the investment fund, except by purchasing units issued by such funds that are subordinated to the other investors' rights in case of redemption, thus having the economic effect of a guarantee.

The rights of a lender under a facility agreement can be divided up between more than one assignee.

29. Does a provision under which a lender and a borrower agree that communications are deemed to have reached the recipient in certain circumstances, even if they do not in fact arrive, work (and are there any specific requirements in relation to a demand by a lender for early repayment)?

Deemed communications are a common feature in loan instruments involving Brazilian parties. They would be valid when the communication does not reach the recipient due to force majeure independent of fault of action of the notifying party. Typical examples would be mail or telecommunications service disruption or failure. Brazilian law authorises a party to undertake liability for force majeure events that damage its rights.

30. Is an agreement by a borrower not to set off any amounts due to it by a lender, against amounts due from it to the lender, enforceable by the lender?

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Yes. An agreement by a borrower not to set off any amounts due to it by a lender against amounts due from it to the lender is enforceable by the lender under Brazilian law.

31. Is a one-sided jurisdiction clause (limiting the borrower to commencing proceedings in one specific jurisdiction only, but allowing the lender to commence proceedings anywhere) enforceable in your jurisdiction?

One-sided jurisdiction clauses are authorised under Brazilian law. However, forum selection clauses can be disregarded by Brazilian courts in case of abuse, for example, when the sole object of the clause is to render impossible the filing of the action by one of the parties.

There are some situations where the relevant Brazilian court will always have jurisdiction, regardless of the provisions set out in the facility agreement (for example in the case of litigation involving real estate situated in Brazil or arising from contracts entered into by Public Administration entities).

Moreover, Brazilian case law may apply the Consumer Code to bank contracts in some situations (for example where there is an economic inequality between the parties). In these circumstances, a one-sided clause would rarely be accepted.

32. Is arbitration or some other form of non-court dispute resolution procedure sometimes agreed on in the case of a facility agreement involving your jurisdiction, and will the courts in your jurisdiction recognise and enforce an arbitration award given against a borrower without re-examining the merits of the case?

Yes, arbitration is occasionally agreed on in facility agreements.

Awards rendered in Brazil, or by arbitral tribunals seated in Brazil, are automatically enforceable, but awards rendered abroad are only enforceable in Brazil after a procedure of recognition of the award before the Superior Court of Justice. This procedure is not a re-examination of the merits of the case, but instead an analysis of the validity of the arbitration commitment and process. To be recognised in Brazil, the award cannot be deemed contrary to national public order and core principles of law. Provided these rules are complied with, the Superior Court of Justice tends to preserve arbitration awards as they were rendered.

33. Are there any restrictions in the case of foreign lenders who wish to (a) commence proceedings against a company in your jurisdiction or (b) enforce security rights within your jurisdiction? Are these

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restrictions different depending on whether the foreign lender is incorporated or authorised in an EU member state or a non-EU country?

There are no restrictions on foreign lenders, regardless of their jurisdiction of incorporation or authorisation, with regards to commencing proceedings against a company in Brazil or enforcing security rights. See *Question 10* for the enforcement of fiduciary security in favour of foreign financial institutions.

These rules are not different if the foreign lender is incorporated or authorised in an EU member state.

34. What category/ies of creditor of the borrower can rank ahead of the lender in respect of entitlement to repayment, both while the borrower is a going concern and in an insolvency?

While the borrower is a going concern and is not facing a judicial or extrajudicial recovery, there are no categories of creditors ranking ahead of the lender in respect of entitlement to repayment. Since all creditors can be repaid in such situations, no choice is necessary.

However, if the borrower is undergoing a judicial or extrajudicial recovery, the claims must observe the order determined by the recovery plan (to be approved by the creditors and the court).

All claims existent at the time of a request for judicial recovery are subject to such procedure (including unmatured claims), except claims:

- By tax authorities.
- Of lessors, owners or committed sellers of real estate, or owners under a sale agreement with a title retention clause.
- Of creditors guaranteed by fiduciary security (see *Question 27*).
- Of creditors who entered into a facility agreement with a borrower who is undergoing a judicial recovery procedure, this agreement being conditioned to authorisation from the judge conducting the recovery procedure.

However, even in the case of enforcement of rights excluded from the judicial recovery as per the preceding paragraph, enforcement against secured assets that are capital goods deemed as essential for the debtor's activities by judicial ruling cannot take place until 180 days after the start of judicial recovery. This term can be exceptionally extended once for the same period of time if the debtor has not contributed to the delay.

In case of the borrower's bankruptcy, claims are ranked in a list that depends on the existence of security, in the following decreasing order of priority:

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- Labour claims in general (limited to a maximum amount of 150 times the minimum Brazilian wage per creditor) and labour claims related to indemnification for workplace accidents.
- Secured claims (limited to the value of the security).
- Tax claims (except for tax fines).
- Unsecured claims.
- Contractual fines and monetary fines arising from disobedience to statutes, a category that includes monetary penalties for default in financial agreements, but not default interest.
- Subordinated debts, as created for instance by specific debt subordination agreements between creditor and debtor.
- Interest accrued after the bankruptcy procedure has commenced.
- Pledges, mortgages or other security constituted by the debtor without receipt of sufficient consideration during a "legal period" preceding insolvency are not effective in bankruptcy, and the respective claims will be deemed unsecured.

The legal period may start, at the judge's discretion, at the date of the:

- Bankruptcy petition.
- Request for judicial recovery.
- First protest of a claim due to its non-payment by the debtor.

The judge has discretion in determining the length of the period, which in any case must not exceed 90 days. Some claims are excluded from the list above and thus are paid independently as though bankruptcy had not taken place, without subordination to the above listed claims:

- Claims secured by financial security, up to the value of such security, since the title to the security has already been transferred to the creditor.
- Claims for loans extended after the start of the judicial recovery procedure of the now bankrupt debtor (a type of finance frequently referred to as "debtor in possession" or "DIP" finance, this benefit being granted as an incentive to economic recovery of the enterprise).

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