ICLG

The International Comparative Legal Guide to:

Securitisation 2016

9th Edition

A practical cross-border insight into securitisation work

Published by Global Legal Group, with contributions from:

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable "contract" be deemed to exist as a result of the behaviour of the parties?

Contracts with a value greater than 10 times the Brazilian monthly minimum wage (approximately US$220 on 1 March, 2016) must be undertaken in writing. Although not required, it is advisable that contracts with a smaller value are also evidenced by a written agreement to facilitate its judicial enforcement.

In general, invoices alone are not sufficient to create a debt obligation. However, Brazilian law allows the provider of goods or services to issue a 'duplicate' of the invoice (*duplicata*). The *duplicata* together with (i) a receipt issued by the debtor to the effect that a good or service has been received, and (ii) a protest issued in writing by a public notary stating that payment has not been received in due time, form a debt instrument that can be foreclosed in court.

In certain circumstances, the behaviour of the parties is sufficient for a receivable "contract" to be deemed to exist. Generally, these situations are based on the historic relationship between the parties or the standard market practice related to certain types of receivables.

1.2 Consumer Protections. Do your jurisdiction's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

Interest rates can be freely contracted when at least one of the parties is a financial institution. That not being the case, there is a limit on interest rates charged by non-financial institutions that is equivalent to the rate charged by the government for late payment of federal taxes.

Brazilian law provides a statutory right to interest on late payments, which corresponds to the rate charged by the government for late payment of federal taxes. Such statutory rate applies unless the agreement or specific law provides otherwise. Penalties for late payments on consumer contracts are capped at 2%.

Consumers may cancel a contract within a period of seven days from its signature or receipt of the good or service, whenever contracting products and services outside a shop (i.e., by internet or telephone). Upon cancellation, receivables are cancelled and any amount already paid by the consumer must be promptly returned with the corresponding monetary adjustments.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

The sale of receivables owned by the government or a government agency is a sale of public assets and therefore is subject to specific rules, which provide that government sales must be undertaken through a public auction in accordance with a procedure detailed by law (Federal Law No. 8.666, dated 21 June, 1993).

Furthermore, restrictions are imposed by law on the level of indebtedness by the government and its agencies. Because of that, agreements for the sale of government receivables generally avoid provisions by which the seller accepts liability for non-performance of the assigned credits. The collection of receivables owned by the government or by a government agency must be pursued by the relevant entity rather than by the purchaser, via a special collection suit available only to the benefit of public entities. The purchaser may only collect the receivable directly against the obligor if the sale was formalised prior to the commencement of such collection.

In case the receivable is owned by a private seller and the government or government agency is the obligor, then the collection must be pursued in court, subject to the following specific rules, among others: (a) the claimant will not be entitled to attach or seize any obligor's assets; (b) the final decision against the obligor will not be immediately enforceable; and (c) the judge will issue an order of payment, that will wait in line until all previous orders have been complied with (this could take years).

Since several exceptions to the rules above may apply in relation to government-originated credits, a case-by-case analysis is strongly advised.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?

According to Article 9 of Decree-Law No. 4.657, dated 4 September, 1942, an obligation is governed by the law of the place of signature

of the contract. If the parties are not found in the same country at the moment the contract is formed, the contract is considered formed at the place where the last person to sign the agreement signed it. A different rule applies to contracts formally made of an offer to be accepted via a separate copy of the same instrument by the other party, in which case the law of the place of residence of the offeror prevails. Furthermore, there is jurisprudential authority to the effect that choice of law in violation of such provisions is not acceptable; this view has, however, not been upheld in recent cases and final resolution on this rule is still pending.

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

No, Brazilian law will apply in this case.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

As noted in our answer to question 2.1 above, to the extent that the choice of law does not violate Article 9 of Decree-Law No. 4.657/42, a judicial court in Brazil will give effect to the choice of a foreign law (arbitral tribunals in Brazil, as opposed to judicial courts, are likely to always give effect to said choice).

However, foreign laws, foreign judicial decisions and arbitral awards based on foreign laws (either rendered in Brazil or abroad) will not be enforceable in Brazil in case they violate the Brazilian national sovereignty, public policy or morality.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in your jurisdiction?

The United Nations Convention on the International Sale of Goods entered into effect in Brazil on 1 April, 2014.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdictionian law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction's laws or foreign laws)?

No. Brazilian law does not require the sale of receivables to be governed by the same law that governs the receivables.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

Yes, provided that: (i) the receivables purchase agreement is executed in Brazil; or (ii) the agreement takes the form of a unilateral written offer made by the seller located in Brazil to be accepted via a separate copy of the same written instrument by the purchaser. The agreement shall be registered with the registry of titles and deeds of the domicile of the resident contracting parties to be effective against third parties.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

Yes, Brazilian courts will recognise that sale as effective against the seller and other third parties, notwithstanding the compliance with the foreign law. The obligor's domicile is not relevant for the analysis. Regarding effectiveness against third parties, please refer to question 3.2 above.

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction's own sale requirements?

Yes, but only if both the receivables and the receivables purchase agreement are executed in the obligor's country. As noted in question 2.1 above, to the extent that the choice of law does not violate Article 9 of Decree-Law No. 4.657/42, a judicial court in Brazil will give effect to the choice of a foreign law.

With respect to the enforceability of foreign laws, foreign judicial decisions and arbitral awards based on foreign laws, please refer to question 2.3 above.

Regarding effectiveness against third parties, please refer to question 3.2 above.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

Yes, Brazilian courts will recognise the foreign sale as long as the receivables purchase agreement has been executed in the seller's country.

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

As noted in our answer to question 2.1 above, to the extent that the choice of law does not violate Article 9 of Decree-Law No. 4.657/42, a judicial court in Brazil will give effect to the choice of a foreign law. In the described situation, the law of the purchaser's country should be acceptable if: (i) the receivables purchase agreement is executed in the purchaser's country; or (ii) the agreement took the form of a unilateral written offer made by the purchaser to be accepted via a separate copy of the same written instrument by the seller.

Regarding effectiveness against third parties, please refer to the registration requirement mentioned in question 3.2 above.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

The most common method is to enter into an assignment of credit rights agreement, which is normally notified to the obligor and registered with a public notary. These procedures guarantee the effectiveness of the assignment against the obligor and third parties. The customary terminology is "assignment of credit rights" (*contrato de cessão de crédito*).

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

In general, there are no formalities for a sale of receivables documented in writing to be valid between the parties.

Except if otherwise provided under the receivables contract, no approval or authorisation by the obligor is necessary to render the sale valid and enforceable. However, the sale will only be enforceable against the obligor if the latter is notified about it.

The validity and enforceability against third parties depends on the register of the sale agreement with the registry of titles and deeds of the city of domicile of both parties.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

For promissory notes, transfer is made through endorsement – no other formalities of the kind mentioned in question 4.2 are required. For loans, which are normally evidenced by a written agreement other than a negotiable instrument of credit, the formalities are those described in question 4.2 above. Marketable debt securities, if properly registered with the Brazilian securities authorities and systems of clearance, can be freely sold in stock exchanges and/or over-the-counter markets.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

Notice to the obligor is required for a sale to be effective against the obligor. The obligor's consent is not required unless otherwise provided in the receivables contract (or if the contract prohibits assignment of the receivables). Notice to the obligor cuts off set-off rights with respect to obligor's and seller's liquid financial obligations with one another.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings against the obligor or the seller have commenced? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

There are no general statutory requirements regarding the form of the notice or how it must be delivered if the receivables agreements may be regarded as debt and the transfer as a transfer of debt only

(*cessão de crédito*). If the credit agreement indicates a specific form of notice or if there is any legal requirement for the specific type of credit, the same should be followed. There is no time limit to give notice to obligors. A notice of sale can be delivered after the sale and after insolvency proceedings against the obligor or the seller have commenced and it will only be effective after delivery. The effect is that if a debtor pays the original creditor (seller) prior to receiving the notice, the payment will be valid and the buyer will have no recourse against the obligor. Also, if the receivables are provided as negotiable instruments, they may be assigned without any prior notice to the obligor, and will be valid against the obligor if the assignment was performed in accordance with legal requirements for that particular type of negotiable instrument.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

Yes, the first provision implies that the transfer of receivables may only be made with the express consent of the obligor. The result is slightly different from a provision that subjects the transfer of the agreement itself to the other party's approval. In that case, a transfer of receivables (but not of any obligations) may be done without the obligor's consent. The last provision does not prohibit the transfer of receivables by the seller to the purchaser, because it refers to a restriction to transfer the obligations of the seller and not its receivables (rights) against the obligor.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

Yes, all restrictions referred to in question 4.6 are enforceable in Brazil and there are no exceptions to this rule. If the receivables are sold or assigned in breach of the contractual provision, in general only the seller is liable to the obligor for breach of contract and the purchaser will have no title to claim payment of the receivables from the obligor.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

There is no statutory provision as to what type of information is necessary on each receivable for the sale to be valid; however, the sale document shall include sufficient information so that the receivables sold can be properly identified. Simply stating that the seller sells *all* of its receivables, or all of the receivables owing by a certain obligor, is not sufficient identification of the receivables. Usually, it is common to indicate in respect to each receivable: the obligor's name and taxpayer registration number; the date of execution of the receivables contract; and the invoice number and payment date. Assignment of future receivables usually makes reference to the commercial agreement that will give rise to the future receivables. Sale of real estate receivables shall also contain a reference to the relevant real estate.

Different kinds of receivables – sharing or not objective characteristics – can be sold under the same sale contract.

4.9 Respect for Intent of Parties; Economic Effects on Sale. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale will this description and statement of intent automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; or (d) a right of repurchase/ redemption without jeopardising perfection?

Brazilian law does not, as a rule, apply a substance-over-form approach in transaction analysis and, as a result, the parties are free to negotiate the terms of the sale without jeopardising perfection. However, in case the economic characteristics of the transaction completely deprive the sale from having effect, the transaction may be considered 'simulated' and thus void, notwithstanding the description of the transaction in the relevant documents as an outright sale. The question is one of fact to be determined on a case-by-case basis.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

Yes. The seller can agree in an enforceable manner to continuous sales of receivables. This is common in Brazil.

Pursuant to the Brazilian bankruptcy law, bilateral agreements do not automatically terminate due to insolvency. The judicial

administrator may continue the sales of receivables if the performance of such obligations will reduce the amount due by seller (the insolvent counterparty), or avoid its increase, and it is authorised by the creditors' committee.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to or after the seller's insolvency?

The seller can commit to sell receivables that come into existence after the date of the receivables purchase agreement in an enforceable manner. In fact, this has been recognised by the Brazilian Securities Commission ('CVM'), which, in 2006, issued regulations providing for a specific type of receivables investment fund (*fundo de investimento em direitos creditórios*, or 'FIDC'), called 'non-standardised FIDC'. This type of fund may securitise receivables which will come into existence after the date of the sale contract. With respect to the identification of future receivables in order to structure the sale in a valid and enforceable manner, please refer to question 4.8 above.

This analysis is altered after the insolvency of the seller is declared, since the administrator is vested with the power to terminate any agreement in case continuing to perform such agreement is not profitable for the bankrupt estate. As a result, in case of bankruptcy there is discretionary room for a decision regarding the continued validity of the assignment agreement.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Except if provided otherwise in the agreement, the assignment of a credit includes the related security. As a rule, if there is no prohibition to the sale of the receivables, there shall be no prohibition in transferring the related security. However, it is necessary to notify the guarantor so that he/she/it is aware of the sale of the receivables and that he/she/it is now liable towards the assignee. It may also be necessary to take specific measures to document and register the assignment of the security depending on the nature of the security (e.g., if the collateral is a mortgage of a real estate, assignment must be registered at the relevant real estate registry).

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

In this situation the obligor's set-off rights terminate upon receipt of notice of a sale. Neither the seller nor the purchaser are liable to the obligor for the damages caused by such termination.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected?

This is not a regular feature in most transactions, but it can be negotiated between the parties. An alternative commonly used in Brazil as a means for the creation of back-up security is the assignment by a seller to the purchaser of a greater number of credits than the final value to be securitised, so that the excess works as extra collateral.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

A written clause in the agreement assigning the credits is recommended.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

If the security takes the form of a pledge, perfection would require a written agreement registered with a registry of titles and deeds of the place of residence of the pledgor and the pledgee, together with notification to the obligor of pledged receivables. In case the purchaser's assets include real estate or real estate-related receivables, registration of the lien with the competent real estate registry is also required.

Alternatively, the security might take the form of transfer of fiduciary ownership of the receivables. In this case, the purchaser recovers ownership upon payment of the debt. Here again, the lien is perfected through its registration with the registry of titles and deeds of the place of residence of the parties.

Between 2011 and 2015 new regulations were issued to the effect that liens over financial instruments and securities in transactions carried out in the capital markets or before the Brazilian clearance systems would have to be registered with an entity authorised for such purposes by the Central Bank of Brazil or the Brazilian Securities Commission ('CVM'). There was a reasonable time for the clearance systems to adapt to the new regulatory framework, and finally, on 4 January, 2016, the authorised entities started to register liens over financial instruments and securities.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser's country, will it be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

Brazilian law provides that the applicable law with regard to security interest *in rem* is the law of the domicile of the person in

possession of the relevant asset. This rule is more easily adaptable to material assets. As to receivables, given that they are rights, the most sensible view is to consider that they are kept in the place where the creditor benefited by the pledge is resident. As a result, the terms of the collateral should follow the law of the country of such creditor. If they do not, the validity of the collateral might be impaired.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

As a general rule, no relevant change applies.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?

Brazil does not recognise trusts. However, an agreement may be executed in order to obligate the seller to keep collections received as a depositary, being responsible for the safeguarding and maintenance of such assets, for the benefit of the purchaser.

5.7 Bank Accounts. Does your jurisdiction recognise escrow accounts? Can security be taken over a bank account located in your jurisdiction? If so, what is the typical method? Would courts in your jurisdiction recognise a foreign law grant of security (for example, an English law debenture) taken over a bank account located in your jurisdiction?

Brazil recognises escrow accounts. Security can be taken over a bank account located in Brazil. In a typical case, security over bank accounts takes the form of a pledge over, or of a transfer of fiduciary ownership of, the credit rights owned by the account holder against the bank.

As mentioned in question 5.4 above, the applicable law with regard to *in rem* collateral is the law of the domicile of the person in possession of the asset. As a result, collateral over a bank account located in Brazil shall follow Brazilian law.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

The general rule is the absence of limitations. Exceptions are enforcement limited by insolvency laws or similar procedures.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

The security can be structured to allow – or not allow – the owner of the account to have access to the totality or part of the funds prior to enforcement.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Brazilian bankruptcy law does not provide for an automatic stay. Notwithstanding, the insolvency official, any creditor or the Public Prosecutor's Office may call the securitisation into question by filing a lawsuit seeking the revocation of the agreement or act (the so-called 'revocation suit'). The plaintiff must prove that the aim of the contracting parties was to defraud creditors (i.e., fraudulent collusion between the seller and the debtor regarding the original debt or between the seller and the purchaser regarding the sale of the receivable) as well as that the bankrupt estate (i.e., formerly the seller) has suffered a loss or damage.

Brazilian bankruptcy law, however, protects *bona fide* investors in the case of credits subsequently securitised through the issue of bonds representing them, setting forth that the validity of the transfer shall not be impaired in case this would damage their rights.

If the purchaser is deemed to be only a secured party rather than the owner of the receivables, then the purchaser will not be able to pursue the receivable against the original obligor or exercise any ownership right over the purchased receivable. The receivable will be part of the seller's estate and collectable by the seller under the applicable insolvency proceeding rules; the purchaser may only collect and enforce the rights it may hold against the seller and in the context of the relevant insolvency proceeding. The sole exception is if the security created in favour of a purchaser is a contractual encumbrance called '*alienação fiduciária em garantia*', which transfers to the purchaser the fiduciary ownership of the receivables.

6.2 Insolvency Official's Powers. If there is no stay of action under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?

The insolvency official is not vested with the power to stop the agreements executed by the seller from having legal effect. The adequate means to prohibit the purchaser's exercise of rights regarding a receivable that is otherwise perfected is to file a revocation suit.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties?

Under Brazilian law, the 'suspect' period is referred to as *termo legal* (literally, 'legal term'). It is established by the bankruptcy judge in the bankruptcy decree and can retroact up to 90 days before the date

of the bankruptcy request, of the judicial reorganisation request, or of the first formal complaint for unpaid debts.

The following acts do not produce effects before the bankrupt estate if they occur within such legal term, irrespectively of the existence of a fraudulent purpose or awareness of the contracting party about the financial and economic situation of the debtor: (i) the pre-payment of debts; (ii) payment of matured and enforceable debts in any form other than in the one provided in the relevant contract; and (iii) formalisation of new *in rem* securities in respect to existing debts.

In addition to the above, gratuitous acts and waivers to inheritance or legacy that happened two (2) years before the bankruptcy decree are also ineffective before the bankrupt estate.

There is no difference set forth by law regarding transactions between related and unrelated parties for such purposes.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

According to the Brazilian bankruptcy law, consolidation is not allowed. At most, the transaction may be declared ineffective in case it defrauds creditors.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) sales of receivables that only come into existence after the commencement of such proceedings?

With relation to *(a)* and *(b)*, at this moment in time insolvency is decreed, the management of the company's assets is transferred to the insolvency official. It will be up to the insolvency official, upon authorisation of the creditors' committee, to decide whether to maintain or not the sales agreement.

In case a judicial reorganisation proceeding takes place instead of an insolvency proceeding, the company's activities will not cease. In such a hypothesis, the seller's creditors are granted the power to deliberate on the transaction's conditions for the receivables either in case *(a)* or *(b)*.

6.6 Effect of Limited Recourse Provisions. If a debtor's contracts contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

The debtor cannot be declared insolvent if it pays its debts in the amount corresponding to the limit set forth in the contract.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics?

Brazil has laws and regulations specifically providing for securitisation transactions.

The Brazilian Securities Commission ('CVM') issued Instruction No. 356, dated 17 December, 2001, establishing the legal framework of receivables funds ('FIDC') used as conduit entities for securitisation purposes. On 8 December, 2006 CVM issued Instruction No. 444 providing for 'non-standardised' FIDC, and allowing the securitisation of receivables that bear higher risks.

Apart from FIDCs, Brazilian law provides for other types of securitisation structures. The securitisation of real estate receivables, for instance, can be undertaken through a 'real estate credit securitisation company' (*companhia securitizadora de créditos imobiliários*), under Federal Law No. 9.514, dated 20 November, 1997, or under a 'real estate investment fund' (*fundo de investimento imobiliário*, or 'FII'), under CVM Instruction No. 472, dated 31 October, 2008. The securitisation of financial receivables is undertaken through a 'financial credit securitisation company' (*companhia securitizadora de créditos financeiros*), under Resolution No. 2.686, dated 26 January, 2000, from the Brazilian National Monetary Council. The securitisation of agribusiness receivables can be made through an 'agribusiness securitisation company' (*companhia securitizadora de direitos creditórios do agronegócio*), which is regulated under Federal Law No. 11.076, dated 30 December, 2004.

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

Brazil has laws and regulations specifically providing for the establishment of special purpose entities for securitisation purposes.

FIDCs and FII funds, which are investment vehicles that take the legal form of a joint-ownership (condominium), may be used for securitisation purposes. These are vehicles without legal personality. The formation of such funds requires an administrator, specially licensed and domiciled in Brazil (typically, a financial institution or broker-dealer, with a few other possibilities). Any person or entity can be an investor in a FII. As to FIDCs, only Qualified Investors can invest if typical FIDCs and in FIDCs focused on receivables originated by companies in judicial or extrajudicial reorganisation proceedings. Other non-standardised FIDCs, on the other hand, can only receive investments by Professional Investors.

Professional Investors are: financial institutions and other institutions authorised to operate by the Central Bank of Brazil; insurance and capitalisation companies; pension funds; individuals or legal entities with financial investments in excess of R$10,000,000 and that declare in writing their condition of professional investors; investment funds; investment clubs managed by a CVM-authorised portfolio manager; individuals registered as independent investment agents, portfolio managers, analysts or securities advisors, regarding their own financial resources; and non-resident investors. Qualified Investors are: professional investors; individuals or legal entities with financial investments in excess of R$1,000,000 and that declare in writing their condition of qualified investors; individuals registered with CVM as independent investment agents, portfolio managers, analysts or securities advisors, regarding their own financial resources; and investment clubs that are managed by a member that is also a qualified investor.

Agribusiness, real estate and financial receivables securitisation can be conducted by special purpose Brazilian corporations, the "*companhias securitizadoras*" mentioned in question 7.1. The

requirements for the establishment of these corporations do not differ from the ones applicable to any other Brazilian corporation. Shareholders can be of any nationality but non-Brazilian resident ones must appoint a local attorney. Management can be divided in two layers: an optional non-executive supervisory board (minimum of three individuals, resident or not in Brazil); and the executive directors (minimum of two individuals, all domiciled in Brazil).

Certain securitisation securities, such as certificates of real estate receivables (*certificados de recebíveis imobiliários* or 'CRIs') and certificates of agribusiness receivables (*certificados de recebíveis do agronegócio* or 'CRA') can only be issued by the "c*ompanhias securitizadoras*". There is no restriction on the status of a subscriber of CRI or CRA.

7.3 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

Assuming the contract's choice of law is valid, courts in Brazil will give effect to such provision. However, courts in Brazil limit the reach of this type of contractual provision in the case of fraud perpetrated against creditors.

7.4 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

According to the Brazilian Constitution no restriction or prohibition can limit one's right to file any claim, petition or suit before any Brazilian court. This is a non-disposable right and will certainly prevail against the non-petition clause, even if such clause is grandfathered by a foreign law governing the relevant agreement.

7.5 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Yes. Waterfall provisions are legal and common in securitisations in Brazil.

7.6 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

Ordinarily, a Brazilian court will give effect to contractual provisions or provisions in a party's organisational documents prohibiting the directors from taking specified actions without some other level of corporate approval (i.e.: the affirmative vote of an independent director; or approval by the shareholders), as long as the relevant action is not a duty of the directors under the law.

In respect to actions performed by the directors without the required approval, the company would have recourse against the directors but the Brazilian courts could moderate the effect of the contractual provision to preserve good faith third parties contracting with the company.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with other sellers in your jurisdiction?

The purchase, ownership, collection and enforcement of receivables do not require or cause the interested party to do business in Brazil or to obtain any licence in Brazil. The answer is the same in the case that the purchaser does business with other sellers in Brazil.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

To enforce the collection of sold receivables, the seller or the replacement servicer will need to be empowered to act on behalf of the purchaser. Ordinarily, a contractual provision is included in the sale agreement for that purpose.

In case there is pending litigation, once the obligor has been served the initial summons for the collection and enforcement of the receivables, the replacement of the original claimant (either the seller, the purchaser or any third party such as a replacement servicer) by a new claimant will be subject to the obligor's consent.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

The use of consumer debtor information is restricted by general rules protecting intimacy and private life contained in the Brazilian Constitution as well as banking laws and regulations to the extent that the purchaser is professionally engaged in factoring or similar credit purchase activities. Such rules are not normally construed as restricting the use of obligor information, but only its unauthorised dissemination. In general, it is lawful to send credit protection agencies information on non-performing contracts or loans. The publication of information on non-compliant obligors, on the other hand, violates the rule.

The breadth of the mentioned rules would justify their application not only to the benefit of consumer obligors, but also to enterprises.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

In general, no, provided that: (i) the purchaser acquired only the receivables (as opposed to being assigned the receivables contract, including obligations towards the obligor); and (ii) the receivables contract does not infringe any law. The sale of the receivables does not change the nature of the same. In view of that, some specific rules to the protection of consumers may affect the receivables (irrespectively of who the purchaser is). An example is the rule that allows prepayment at the initiative of the debtor, against proportional reduction of interest.

8.5 Currency Restrictions. Does your jurisdiction have laws restricting the exchange of your jurisdiction's currency for other currencies or the making of payments in your jurisdiction's currency to persons outside the country?

There are presently no important restrictions on the exchange of Brazilian currency or on payments using Brazilian currency to foreigners. In practical terms, the unavailability of accounts in Brazilian currency outside the country is the major obstacle to make payments in Reais outside the country.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest?

There are no withholding taxes when the obligor is an individual. Other than that, payments of receivables can be subject to withholding taxes in Brazil, depending on the nature of the payments and the condition/residence of the purchaser and of the seller. In view of the complexity of Brazilian tax legislation, each transaction should be carefully analysed by a local tax expert.

In the case of a sale of trade receivables at a discount, the discount will be treated as (i) a financial expense/loss (not necessarily interest) to the seller, generally deductible for corporate income tax purposes in case the seller is a Brazilian legal entity taxed under the real profit regime and the loss meets certain legal requirements, and (ii) a financial revenue (not necessarily interest) to the purchaser. If the purchaser is a Brazilian legal entity, this revenue would usually be taxable on a *pro rata* (accrual) basis as from the date of purchase of the receivables until their maturity, for purposes of Brazilian corporate taxes on profits and revenues.

Brazilian tax legislation usually refers separately to "interest" and "discounts" (as diverse figures), although both are equally taxed as financial and operational revenues or expenses, as the case may be.

As mentioned in question 9.2 below, regulatory rules aligned with the International Financial Reporting Standards ('IFRS') provide guidelines as to how a securitisation transaction should be treated for accounting purposes, with potential tax repercussions as well. A general guideline is that transactions' economic essence prevails over their legal form for accounting purposes in Brazil.

For tax purposes, the seller would normally treat the transaction as an assignment of receivables at a loss (discount), while the purchaser would recognise the acquisition of the receivables and tax the respective gain (value of the discount plus any amount earned in excess of the receivables' cost of acquisition) along the term of the securitisation, on an accrual basis (see further comments in question 9.2 below).

In principle, this would also apply to a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, the difference being that such portion of the purchase price would remain as a credit of the seller against the purchaser (and as a debt of the purchaser with the seller) until the purchaser pays it to the seller upon collection of the receivable. However, if in essence the transaction is considered to be a loan and related amounts are considered to be interest in substance, there could be a risk that such amounts be recharacterised in whole or in part as interest. This analysis should be made carefully on a case-by-case basis by local tax and accounting counsel.

A tax on credit transactions ('IOF') may also be charged on assignments of receivables in case the seller is co-obliged therefor, except if the purchaser is a non-Brazilian resident. Such IOF is currently charged at a rate of 0.0041% per day if the co-obliged seller is a legal entity and 0.0082% if the co-obliged seller is an individual, plus an additional 0.38% rate on the value of the transaction. Total IOF is limited to 1.88% in case the co-obliged seller is a legal entity or 3.37% if he/she is an individual, whenever the transaction has a defined principal amount. The borrower/co-obliged seller is the taxpayer, but the lender/purchaser is the party liable for retaining and collecting the IOF.

9.2 Seller Tax Accounting. Does your jurisdiction require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

There are regulatory rules providing guidelines as to how a securitisation transaction should be treated for accounting purposes, with potential tax repercussions as well. As a general guideline aligned with IFRS, the transaction's economic essence is required to prevail over its legal form for accounting purposes in Brazil.

For tax purposes, the seller would normally treat the transaction as an assignment of receivables at a loss (discount), while the purchaser would recognise the acquisition of the receivables and tax the respective gain along the term of the securitisation, on an accrual basis.

Notwithstanding, if a seller legal entity substantially retains all the risks and benefits arising from the ownership of a financial asset or retains substantial control over such asset, it may have to continue to book/recognise the asset for accounting purposes.

In addition, certain receivables and payables classified as financial assets or liabilities should be periodically evaluated at fair market value for accounting purposes. Gains and losses deriving from fair market valuation are usually neutral for tax purposes while there is no realisation of the asset, provided that certain conditions and controls are complied with pursuant to the tax legislation.

9.3 Stamp Duty, etc. Does your jurisdiction impose stamp duty or other documentary taxes on sales of receivables?

There are no stamp duty or documentary taxes on the sale of receivables. Nevertheless, it may be necessary or convenient to register certain sales of receivables with public registries in Brazil so that they are enforceable against third parties. Registration duties are imposed on such registrations.

9.4 Value Added Taxes. Does your jurisdiction impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Sales of goods and certain services are subject to the Brazilian VAT ('ICMS'), while other services not subject to VAT and expressly listed by the tax legislation are subject to a municipal service tax ('ISS').

Sales of receivables are not subject to value added tax, sales tax or other similar taxes on sales of goods or services.

Fees paid by a Brazilian party to a renderer of collection services resident in Brazil are subject to the service tax ('ISS'), which is due by the service renderer at a tax rate of up to 5%, depending on the municipality where the services are rendered/performed. In certain cases, the party hiring the services (purchaser) may be liable for withholding and collecting the ISS.

ISS is not levied on services exported to non-Brazilian residents by Brazilian service renderers, as long as the "results" of the service are verified out of Brazil (i.e., beneficiary of the services located out of Brazil). However, current legislation and case law are unclear as to the situations in which service "results" are deemed to take place outside Brazil, and this matter is often subject to disputes in Brazilian courts.

In case the collection agent is an individual resident in Brazil, fees received from the purchaser (if this is a Brazilian legal entity) would be subject to the Brazilian Withholding Income Tax ('WHT') at rates of up to 27.5%. The purchaser, as the paying source, would be liable for withholding and collecting this tax.

In the case of collection services rendered to a Brazilian purchaser by a non-Brazilian party, payments remitted abroad would be subject to:

(i) ISS at a rate of up to 5%, depending on the municipality where the purchaser is located; ISS is due by the foreign service provider (taxpayer) but must be retained and collected by the Brazilian purchaser;

(ii) WHT at a rate of 25%, which is also due by the foreign service provider (taxpayer) but must be retained and collected by the Brazilian purchaser; if a double taxation treaty based on the OCDE model is in effect between Brazil and the country where the non-Brazilian service provider is domiciled, it may be possible to challenge the Brazilian WHT based on current case law;

(iii) PIS and COFINS (social contributions) levied at a combined rate of 9.25%, which is due and must be collected by the Brazilian purchaser (taxpayer and party liable for the tax collection); and

(iv) Tax on foreign currency exchange transactions ('IOF') at a rate of 0.38%; this tax is due by the purchaser of foreign currency in remittances made overseas, but the party liable for retaining and collecting it is the Brazilian financial institution that closes the foreign currency exchange transaction.

Due to the form of calculating these latter taxes, their total effective tax burden is higher than the sum of the taxes' nominal rates and can vary between 41% and 59% approximately, depending on whether or not the financial burdens of the WHT and ISS are transferred to the Brazilian purchaser under its agreement with the service provider domiciled abroad.

9.5 Purchaser Liability. If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

Brazilian tax authorities cannot charge the purchaser for any taxes due and payable by the seller and that have not been paid by the seller. If, however, the seller had tax liabilities and was insolvent when the receivables were sold, the transaction could be invalidated as a fraud against creditors.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

The mere ownership of the receivables, their acquisition by means of an agreement executed out of Brazil, and the appointment of a collection agent does not render the purchaser resident out of Brazil subject to Brazilian corporate taxation.

On the other hand, Brazilian tax law provides that the maintenance of an agent or representative in Brazil with powers to negotiate contracts and bind their foreign principal can be characterised as a permanent establishment and therefore may subject the foreign entity's income to Brazilian corporate taxation. In view of this, maintenance of an agent or representative in Brazil which purchases receivables contractually binding the foreign entity may trigger Brazilian corporate taxation of the foreign entity's income under the same rules applicable to local entities (the actual tax burden may depend on particular circumstances).

Even if not considered "doing business" in Brazil, the purchaser may be subject to Brazilian taxation on specific situations/transactions (i.e., taxes withheld at source, tax on foreign currency exchange transactions, etc.).

Our considerations above do not include Brazilian taxation potentially applicable to payments made by the purchaser to potential investors under any securities or debt instruments issued by the purchaser in order to fund the acquisition of the receivables.

Note

The information above is a general overview and not an exhaustive explanation on the matters discussed therein. It does not constitute legal advice, which should be sought specifically with regard to any matter on a case-by-case basis.

Acknowledgment

The authors would like to acknowledge Tax Partner Isabela Shenberg Frascino and Corporate Associate Isaac Cattan for their assistance in the preparation and finalisation of this chapter.

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