

Lending to a Company in Brazil: Structuring the Transaction

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A Practice Note looking at the key considerations involved in structuring a loan to a company incorporated or located in Brazil (which may also involve a guarantor or security provider incorporated or located in, or assets located in, Brazil), where the lender is incorporated in another jurisdiction.

It looks at considerations such as tax, costs and regulatory issues, and issues that can affect taking security and guarantees.

Lawyers advising a lender who is proposing to make a loan to a borrower incorporated or doing business in another jurisdiction need to be aware of a variety of issues that can affect the structure of the loan transaction. In addition, if a transaction also involves a guarantor or security provider incorporated or doing business in another jurisdiction, or the assets over which security is being taken are located in another jurisdiction, then there will be other issues to consider.

It is important to identify these issues in the early stages of structuring a transaction, as they can have an impact on key elements of the transaction structure, such as:

- Who the borrower, guarantor, and security providers will be.
- Whether taking guarantees and types of security will be feasible in light of the costs involved.
- The lender's ability to enforce security interests and guarantees.
- The lender's rights in an insolvency of the borrower or other obligors.

This Note looks at the following issues which may affect the structure of a transaction:

- Tax considerations and implications, including withholding taxes, documentary taxes, and other types of taxes that may affect a lender or borrower.
- Costs affecting the transaction, including registration fees, notaries' fees, and any other similar costs imposed on the transaction.
- Issues involved in taking a guarantee or security.
- Issues involved in enforcing a loan, guarantee, or security interest.
- Lenders' rights in an insolvency of a borrower, guarantor, or security provider.
- Regulatory issues affecting foreign lenders, including licensing or registration requirements in Brazil applicable to foreign lenders making commercial loans to a borrower in Brazil.

Tax Implications

The taxes applicable to a loan transaction with a borrower who is incorporated in, or doing business in, a different jurisdiction from the jurisdiction where the lender is incorporated or doing business may have a significant impact on the transaction and whether it is feasible.

Withholding Taxes

In Brazil, a withholding income tax (known as the IRRF) is applicable to payments of interest to foreign (or non-resident) lenders, with the rate generally set at 15%, but the tax rate can be increased to 25% if the recipient is in a tax haven jurisdiction. This withholding tax may be reduced or eliminated under double-taxation treaties that Brazil has entered with other jurisdictions.

For more information, see:

- [Country Q&A, Lending and Taking Security in Brazil: Overview: Question 29 and Question 30.](#)
- [Country Q&A, Tax on Corporate Lending and Bond Issues in Brazil: Overview: Question 7.](#)

Documentary Taxes

There are no documentary stamp duties or stamp taxes applicable to loan agreements, guarantees, or security documents in Brazil.

For more information, see [Country Q&A, Lending and Taking Security in Brazil: Overview: Question 29 and Question 30.](#)

Costs Affecting a Transaction

Registration Fees

In addition to being notarized (see [Notaries' Fees](#)), foreign loan agreements and documents signed outside Brazil must 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 (Article 129, 6th, Law No. 6,015, of December 31, 1973).

This procedure is applicable to loan agreements, guarantees, and security documents, and entails registration costs before the Registry of Deeds and Documents ranging, for example in the City of São Paulo, from approximately BRL119 to BRL23,110 (the actual fees depend on the amount of the loan and on the place where the registration is made). Among various types of security documents, mortgages of assets, fiduciary ownership, and assignments over real estate are often required to be registered to be perfected. (For an explanation of fiduciary ownership security and fiduciary assignment security, see [Practice Note, Lending to a Company in Brazil: Legal and Documentation Issues: Registration of Mortgages, Fiduciary Ownership Security and Fiduciary Assignment Security.](#))

The fees for registration are calculated based on the value of the secured assets or underlying loans and can be substantial. For example, in the City of São Paulo:

- The fees to register with the Real Estate Registry Office a mortgage securing a loan of BRL5 million would be BRL11,889.07.
- The fees to register fiduciary ownership over movable property with the Registry of Deeds and Documents securing a loan of BRL5 million would be BRL3,769.92.
- The fees to register with the Real Estate Registry Office a mortgage securing a loan of BRL20 million would be BRL36,581.81.
- The fees to register with the Real Estate Registry Office a fiduciary ownership over real estate securing a loan of over BRL120 million would be BRL206,232.46.

In addition, pledges (which create a security interest over movable property, such as accounts, *quotas* (that is, portions of the capital of a Brazilian limited company), receivables, or equipment), must be registered before the local Registry of Deeds and Documents, but the office for registration can vary depending on the type of assets being pledged. The fees for registration are calculated based on the value of the secured assets or underlying loans and can be substantial. For example, in the City of São Paulo the fees to register, in the Registry of Deeds and Documents, a pledge agreement covering movable property are capped at BRL23,110.59.

Caveat as to Registration and Fees

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

For more information, see:

[Practice Note, Lending to a Company in Brazil: Legal and Documentation Issues.](#)

[Country Q&A, Lending and Taking Security in Brazil: Overview: Question 29 and Question 30.](#)

Notaries' Fees

Notarial fees are determined locally by state laws in Brazil. The state laws generally set up the fees in scales taking as a reference the economic value provided for in the document. For example, in the City of São Paulo, the typical fees for the notarization of loan agreements, guarantees, or security documents can range from BRL8 to BRL12.20, depending on whether the document has economic value.

Furthermore, mortgages for an amount of more than BRL36,000 (approximately) must be made by a public deed. Notaries' fees for drafting a public deed in the City of São Paulo must not exceed BRL8,530.88 per real property mortgaged (and different fees apply in other locations).

For more information, see [Practice Note, Lending to a Company in Brazil: Legal and Documentation Issues.](#)

Issues in Taking a Guarantee or Security

Rules Affecting Validity of Loans or Their Terms

Under general corporate governance law, loans should be made at arm's length. Typical examples of non-arm's length transactions include transactions that benefit parent companies, affiliated companies or subsidiaries, or officers or members of the lender's board of directors, and that are not on market terms. In addition, a loan made by an entity to one of its officers, directors, or managers for their own benefit must also have the prior authorization of shareholders.

Other Causes of Invalidity

The validity of security and guarantees may also depend on the satisfaction of registration, notarization, and apostille or legalization requirements. Those requirements vary depending on where the agreement was executed, the details of the security or guarantee, and the assets covered by security. For more information, see [Practice Note, Lending to a Company in Brazil: Legal and Documentation Issues](#).

Corporate Benefit

An obligor may be required, under its constitutional documents, to demonstrate to its own shareholders or holders of *quotas* (portions of the capital of a Brazilian limited company) that a proposed loan, guarantee, or security document will have a corporate benefit to the company.

If an obligor fails to do so, the managers responsible for entering into a loan agreement may be liable to the company's shareholders for any loss or damage suffered, on the ground that the company failed to comply with its corporate purposes or acted exclusively for the benefit of a third party (Article 158, Law No. 6404/76). A lender should not be affected by such actions, however, if the loan documents are executed by people who are entitled to represent an obligor according to its constitutional documents.

Similarly, while lending of money between a lender and a borrower that are related or associated companies is generally allowed, financial institutions which are authorized by the Brazilian Central Bank and carrying on business in Brazil cannot grant loans or advances of any kind to certain related entities or persons, unless the transaction is undertaken at arm's length and within certain limits, among other exceptions (Article 34, 4th Paragraph, insert I, Law No. 4,595/64). This includes loans granted by a foreign branch of a Brazilian financial institution.

Financial Assistance

There are no laws in Brazil directly prohibiting or restricting financial assistance (that is, the borrowing or guaranteeing of loans by a company used to finance the acquisition by a third party of that company's shares or the shares of its parent company).

For a company to borrow a loan or grant collateral for financial assistance purposes, there must generally be prior authorization of the board of directors or the general meeting of shareholders. Both shareholders and directors are required to act in the best interests of the company (Articles 115 and 154, Law No. 6,404/76). Accordingly, any financial assistance must serve or be in favor of the company's best interests.

In addition, the company's constitutional documents may include restrictions against the company providing any loans, guarantees or security to benefit a third party aiming at purchasing its shares or the share of its parent company or another affiliated company.

Environmental Laws

The subject of a lender's environmental liability is controversial in Brazil, and there is currently no consensus on this issue.

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

- Verify whether the borrower is registered at the appropriate environmental registry before the granting of any agricultural loans or loans for a project or activity relating to genetically modified organisms.
- Adopt adequate criteria to evaluate environmental and climate risks before providing any financing. This obligation is set out in regulations issued by the National Monetary Council (CMN) (Resolution CMN No. 4,945/2021).

A lender may obtain protection from liability to third parties by including a provision entitling it to accelerate, or demand early repayment of, the loan if the borrower fails to comply with environmental matters and this is independently detected by an environmental agency.

Based on case law of the Brazilian Higher Court of Justice, a lender (whether a foreign lender or a Brazilian lender) may also be liable for environmental damage to real estate, if the lender acquires full ownership of the real estate as a result of the enforcement of fiduciary assignment security (*alienação fiduciária*) created over it.

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

For more information, see:

- [Country Q&A, Lending and Taking Security in Brazil: Overview: Question 14.](#)
- [Practice Note, Lending to a Company in Brazil: Legal and Documentation Issues.](#)

Issues in Enforcing a Loan, Guarantee, or Security Interest

There are no restrictions on foreign lenders, regardless of their jurisdiction of incorporation or authorization, with regard to commencing proceedings against a company in Brazil or enforcing security rights. For restrictions on making loans and taking security or guarantees, please see [Practice Note, Lending to a Company in Brazil: Regulatory Issues](#).

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

For more information, see [Country Q&A, Lending and Taking Security in Brazil: Overview: Question 19](#) and [Question 20](#).

Lenders' Rights in Insolvency

Summary of Insolvency and other Reorganization Procedures

The insolvency and reorganization procedures in Brazil are:

- Insolvency (*Processo de Falência*).
- Judicial restructuring (*Recuperação Judicial*).
- Extra-judicial restructuring (*Recuperação Extrajudicial*).

Special insolvency procedures are available to financial institutions and certain other institutions (such as securities brokers and dealers and payment institutions). These are:

- Special administration (*Intervenção*).
- Temporary Special Administration (*Regime de Administração Especial Temporária*).
- Extra-judicial liquidation (*Liquidação Extrajudicial*).

In the event of judicial or extrajudicial restructuring procedures, the lender's claims against the borrower (including secured claims) are subject to the payment terms stated in the restructuring plan (for more information and excepted claims, see [Order of Priority](#)), and must be enforced in accordance with this plan (Articles 49 and 161, 1st Paragraph, Law No. 11,101/05 (*Lei de Recuperações e Falências*)). Fiduciary security, however, is not subject to restrictions in the restructuring plan (Article 49, 3rd Paragraph, Law No. 11,101/05).

Where an insolvency procedure has started, the lender's claims against the borrower are subject to the order of priority defined by the Brazilian Bankruptcy Act (*Lei de Recuperações e Falências*). The start of an insolvency procedure prevents a lender holding a mortgage and a lender holding other security, other than fiduciary security, from enforcing their respective security. The secured creditors will be paid to the extent that the assets listed in the insolvency are sufficient to satisfy the preferred creditors (according to the order of priority described below, see [Order of Priority](#)).

A moratorium does not affect guarantees or security granted by entities other than the borrower, where the borrower is in an insolvency procedure but the guarantor or security provider is not.

For more information in relation to insolvency procedures in Brazil, see [Practice Note, Lending to a Company in Brazil: Legal and Documentation Issues: Events of Default](#).

Order of Priority

If the borrower is undergoing a judicial or extrajudicial restructuring, the claims must observe the order determined by the restructuring or reorganization plan (to be approved by the creditors and the court) (Articles 59 and 161, 6th Paragraph, Law No. 11,101/05).

All claims existing at the time of a request for judicial restructuring are subject to this procedure (including unmatured claims), except claims:

- By tax authorities (Article 6, Paragraph 7-B, Law No. 11,101/05).
- Of lessors, owners or committed sellers of real estate, or owners under a sale agreement with a title retention clause (Article 49, 3rd Paragraph, Law No. 11,101/05).
- Of creditors guaranteed by fiduciary security (Article 49, 3rd Paragraph, Law No. 11,101/05).

- Of creditors who entered into a loan agreement with a borrower who is undergoing a judicial recovery procedure, which agreement is conditioned on authorization from the judge conducting the recovery procedure (Article 69-B, Law No. 11,101/05).

However, even in the case of enforcement of rights excluded from the judicial restructuring as described in the preceding paragraph, enforcement against secured assets that are capital goods (which a court rules are essential for the debtor's activities) cannot take place until 180 days after the start of judicial restructuring (Article 49, 3rd Paragraph, Law No. 11,101/05). This period can be exceptionally extended once for the same period of time if the debtor has not contributed to the delay (Article 6, 4th Paragraph, Law No. 11,101/05).

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

- Labor claims in general (limited to a maximum amount of 150 times the minimum Brazilian wage per creditor) and labor 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 a breach of criminal or administrative statutes, a category that includes monetary penalties for default under any financial agreements (including loan agreements), but not default interest.
- Subordinated debts, such as those created by specific debt subordination agreements between creditor and debtor.
- Interest accrued after the bankruptcy procedure has commenced.

(Article 83, Law No. 11,101/05.)

Pledges, mortgages, or other security granted by the debtor in exchange for insufficient consideration during a "legal period" preceding insolvency, are not effective in bankruptcy, and the respective claims will be deemed unsecured (Article 129, insert III, Law No. 11,101/05). The legal period starts, at the judge's discretion, at the date of the:

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

(Article 99, insert II, Law No. 11,101/05.)

The judge has discretion in determining the length of the period, which in any case must not exceed 90 days.

Certain claims are excluded from the priority list above and therefore are paid independently as though bankruptcy had not taken place, without subordination to the above listed claims. The excluded claims are:

- Claims secured by fiduciary security, up to the value of such security, since the title to the security has already been transferred to the creditor (Article 85, Law No. 11,101/05).
- 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) (Article 84, insert I-B, Law No. 11,101/05).

Certain Loans, Guarantees, or Security as Void

Certain transactions involving loans, guarantees, or security interests can be made void under Brazilian law, if the borrower, guarantor, or security provider becomes insolvent in Brazil. For a transaction entered into by the insolvent party to be made void, the following conditions need to be met:

- The insolvent party intended to harm its creditors.
- There is evidence of:
 - a fraudulent collusion between the insolvent party and the counterparty to the transaction; and
 - an actual loss to the insolvency estate resulting from the transaction.

(Article 130, Law No. 11,101/05).

For more information, see:

- [Country Q&A, Lending and Taking Security in Brazil: Overview: Questions 21 to 24.](#)
- [Country Q&A, Restructuring and Insolvency in Brazil: Overview.](#)

Regulatory Issues Affecting Foreign Lenders

Making a Loan

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can make a commercial loan to a borrower in Brazil, such as licensing, filing, or registration requirements, see [Practice Note, Lending to a Company in Brazil: Regulatory Issues: Restrictions on Making Loans.](#)

Taking a Guarantee or Security Interest

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can take a guarantee or a security interest from an entity in Brazil, or a security interest over assets located in Brazil, see [Practice Note, Lending to a Company in Brazil: Regulatory Issues: Restrictions on Taking Security or a Guarantee.](#)

Enforcing Rights Under a Loan Agreement

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can enforce its rights under a loan agreement against a borrower in Brazil, see [Practice Note, Lending to a Company in Brazil: Regulatory Issues: Restrictions on Enforcing Rights Under a Loan Agreement](#).

Enforcing Security Interests

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can enforce security interests in Brazil, see [Practice Note, Lending to a Company in Brazil: Regulatory Issues: Restrictions on Enforcing Security](#).

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