Lending to a Company in Brazil: Regulatory Issues

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A Practice Note looking at regulatory issues for a proposed loan finance transaction where the borrower is a company incorporated in Brazil and the lender is incorporated in another jurisdiction. It considers economic and trade sanctions laws, anti-money laundering laws, anti-corruption and anti-bribery laws, and currency exchange controls in Brazil of interest to foreign lenders, and highlights any licensing or other restrictions on foreign lenders making loans to, or taking security or guarantees from, a company incorporated in Brazil.

Lawyers advising a lender who is proposing to make a loan to a borrower in another jurisdiction need to be aware of the various issues that may arise as a result of the different jurisdictions involved in the transaction. Regulatory issues in a jurisdiction may cause problems in a transaction, and it is essential to identify these problems early on so that they can be dealt with to ensure that the transaction runs smoothly.

This Note highlights the following regulatory issues that apply to foreign lenders:

- Laws and regulations in Brazil relating to economic and trade sanctions.
- Anti-money laundering laws and regulations in Brazil.
- Anti-corruption and anti-bribery laws and regulations in Brazil.
- Currency exchange controls in Brazil.
- Restrictions on a foreign lender making loans or taking security or guarantees in Brazil.
- Other doing business requirements in Brazil that may apply to the making of loans by a foreign lender to a borrower in Brazil.

This Note does not consider or address consumer finance laws or regulations.

Economic and Trade Sanctions

Legal Framework: Economic and Trade Sanctions

Brazilian law does not impose economic or trade sanctions on countries or individuals.

However, Brazil is a signatory to the United Nations Charter, which requires it to enforce any decisions imposed by the United Nations Security Council (UNSC). The UNSC may impose economic or trade sanctions on a country, such as full or partial embargoes and restrictions on exports to that country. If it does so, Brazil will act in accordance with the UNSC decision. Other

international organizations to which Brazil has adhered, such as the Southern Common Market, also authorize contracting states to impose sanctions of this sort.

Penalties for Breach of Economic and Trade Sanctions

Penalties for breach of economic and trade sanctions will depend on which organization imposed those sanctions.

For example, in the case of sanctions imposed by the UNSC, Law No. 13,810/2019 provides for the enforceability of those sanctions. It obliges the entities referred to in Article 9 of Law No. 9,613, of March 3, 2018, such as commercial banks and brokers, to freeze the assets of any individuals or entities subject to sanctions imposed by the UNSC. If an entity breaches any provisions of Law No. 13,810/2019 or of any regulations attached to that law, that entity might be subject to administrative penalties to be applied by its regulatory or supervisory authority in Brazil.

Economic and Trade Sanctions Provisions in a Loan Agreement

Representations and covenants about economic and trade sanctions are typically included in loan agreements providing for loans to a borrower in Brazil.

Usually, a borrower will represent that the borrower, its corporate group, directors, officers, and employees are not subject to economic and trade sanctions imposed by countries or international organizations.

In addition, a borrower will typically covenant not to use the proceeds of the loan in either of the following ways:

- To benefit in any way an individual or entity subject to economic or trade sanctions.
- In a way that would result in a breach of economic or trade sanctions laws and regulations.

Anti-Money Laundering Laws and Regulations

Legal Framework: Anti-Money Laundering

The Anti-Money Laundering Act (Law No. 9,613/1998) (AMLA) provides that money laundering is a criminal offence in Brazil (Article 1, AMLA). AMLA provides for anti-money laundering administrative duties imposed on financial services providers and certain other services providers (Article 9, AMLA). These duties include the following:

- Customer identification (appropriate Know Your Customer procedures).
- Record-keeping (appropriate records of customers and transactions to be kept, among other information).
- Implementation of anti-money laundering policies and control structures.
- Responding to requests made by the Financial Activities Control Council (*Conselho de Controle de Atividades Financeiras* (COAF)), the Brazilian anti-money laundering watchdog.
- Reporting suspicious money laundering transactions to COAF.

(Articles 10 and 11, AMLA.)

These duties are applied to the relevant entities by regulations issued by the following:

- **Specific regulatory or supervisory authorities.**

  Regulations issued by regulatory authorities apply to entities acting in the relevant regulated sectors, such as financial institutions licensed by the Central Bank. For example, financial institutions licensed by the Central Bank must comply with Circular No. 3,978/2020, from the Central Bank, which requires a licensed institution to:

  - establish adequate anti-money laundering internal policies and structures;
  - properly identify its clients (both individuals and legal entities, including identification of politically exposed people), employees, business partners, and services providers;
  - keep records of transactions; and
  - monitor transactions and report suspicious transactions to COAF.

- **COAF.**

  Administrative rules issued by COAF apply to entities that perform any of the activities listed in Article 9 of Law No. 9,613/1998 that are not subject to a specific regulatory or supervisory authority (Article 14, first paragraph, AMLA). This is the case, for example, for entities that sell, or intermediate the sale of, high-value goods (movable goods with a unit value equal to or higher than BRL10,000.00, or approximately USD1,900.00).

As far as counter-terrorism financing is concerned, the key statute is Law No. 13,810/2019. This law requires the entities listed in Article 9 of AMLA to freeze assets of parties penalized by the UNSC and to inform COAF of the actions taken. An entity listed in Article 9 must comply with Law No. 13,810/2019 in accordance with procedures detailed by rules issued by:

- Its relevant regulatory or supervisory authority (such as the Central Bank in case of licensed financial institutions).
- COAF if that entity is not subject to a specific regulatory or supervisory authority.

Penalties for Breach of Anti-Money Laundering Laws and Regulations

An individual or entity in breach of anti-money laundering laws and regulations may be subject to administrative and criminal penalties (the latter of which are applicable only to individuals).

In terms of administrative penalties, the relevant regulatory or supervisory authority (such as the Central Bank in the case of financial institutions carrying on business in Brazil) may apply the following penalties, cumulatively or separately, to a regulated or supervised entity referred to in Article 9 of AMLA, as well as to its officers (Article 12, AMLA):

- An admonition.
- A fine limited to the lowest of the following:
  - twice the value of the transaction;
  - twice the actual profit obtained or which would be obtained from the transaction; or

    - the amount of BRL20 million.

- In the case of an officer of a regulated or supervised entity, temporary suspension for a term of up to ten years, of their ability to act as officer to the entities referred to in Article 9 of AMLA. This penalty is applicable only to serious breaches of anti-money laundering laws and regulations or to a specific relapse in relation to a previous breach that was punished with a fine.
- Revocation of the authorization to perform a business activity, an operation, or to operate. This penalty is applicable only in cases of a specific relapse in relation to a previous breach punished with a temporary suspension.

In terms of criminal penalties, individuals who commit money laundering crimes are subject to imprisonment ranging from three to ten years plus fines (Article 1, AMLA). The penalty is increased by one third to two thirds if the crime is repeatedly committed by an individual or is committed through a criminal organization (Article 1, fourth paragraph, AMLA).

The penalty may be decreased by one third to two thirds if that individual cooperates with the law enforcement authorities by providing information regarding the relevant crime (Article 1, fifth paragraph, AMLA).

Anti-Money Laundering Provisions in a Loan Agreement

A loan agreement providing for a loan to a borrower in Brazil will typically require the obligors to represent that they are:

- Familiar with and in compliance with all applicable anti-money laundering and counter-terrorism financing laws and regulation.
- Not listed in international sanctions lists (blocked people), such as the Specially Designated Nationals and Blocked Persons Sanctions List administrated by OFAC or the UN Sanctions List, and that they are not engaged in any business with any blocked people.

Breach of these representations will typically entitle the lender to accelerate the loan.

A loan agreement providing for a loan to a borrower in Brazil will typically also include an undertaking from the obligors to ensure that no funds used to repay the lenders will be derived from any unlawful activity.

Anti-Corruption and Anti-Bribery Laws and Regulations

Legal Framework: Anti-Corruption and Anti-Bribery

Corruption and bribery are subject to criminal, civil, and administrative enforcement in Brazil.

In terms of criminal penalties, the Brazilian Criminal Code (Decree-Law No. 2,848/1940) (*Código Penal*) sets out penalties applicable to individuals for corruption practices involving national and foreign public officials. Two types of corruption are defined in this Code:

- "Active corruption" (*corrupção ativa*), defined as offering or promising undue advantages to government officials to cause them to conduct, omit, or delay any acts performed or to be performed in their capacity of government officials.

- "Passive corruption" (*corrupção passiva*), defined as the request, receipt, or acceptance of promise of undue advantages by officials.

In terms of civil penalties, the Public Improbity Law (Law No. 8,429/1992) (*Lei de Improbidade Administrativa*) sets out penalties for individuals and legal entities engaging in certain corrupt practices to the detriment of Brazilian public entities. In addition, the Clean Company Act (Law No. 12,846/2013) (*Lei Anticorrupção*) introduced strict corporate liability for corrupt practices at the administrative level. Other statutes may also apply in specific circumstances, for example, the Public Tender Law (Law No. 14,133/2021) (*Lei de Licitações e Contratos Administrativos*) in the case of companies contracting with public entities.

Depending on their size and the nature of their activities, it is local practice for Brazilian companies to implement compliance programs, including general guidance on ethics, anti-corruption and anti-bribery practices. Decree No. 11,129/2022 sets forth the criteria that should be taken into account when assessing any such compliance program and Regulation No. 909/2015 of Ministry of Transparency and General Controller (*Controladoria Geral da União*) establishes the procedures for that assessment. Joint Regulation No. 2,279/2015 prescribes a simplified procedure for assessing compliance programs in small businesses.

Regulated entities carrying on business in Brazil may need to follow specific compliance administrative rules. For example, if the borrower is a Brazilian financial institution authorized by the Central Bank, it must put in place a compliance program covering integrity and ethics practices according to Resolution No. 4,595/2017 of the National Monetary Council (CMN).

Penalties for Breach of Anti-Corruption and Anti-Bribery Laws and Regulations

The penalty under the Brazilian Criminal Code for individuals found guilty of active or passive corruption (see Legal Framework: Anti-Money Laundering) is imprisonment ranging from 2 to 12 years, plus a fine. The penalty is increased by one third if the bribe effectively causes a government official to, in their capacity, conduct, omit, or delay acts in violation of their duties. Individuals found guilty of acts of corruption in international commercial transactions and involving payments to foreign government officers may face imprisonment, ranging from one to eight years, plus fines.

In term of administrative penalties, the penalties under the Clean Company Act for a company found to have engaged in corrupt practices, that is, harmful acts to a national or an international government, include the following:

- Fines ranging from 0.10% to 20% of the company’s gross revenue in the year before the commencement of the investigation (before taxes are deducted). If it is possible to estimate the financial benefit obtained by the company as a result of the corrupt practices, the amount of the fine must not be lower than that financial benefit.
- Publication of the condemnatory decision. The decision will be published in a means of communication that is in wide circulation in the field in which the company operates and the breach was committed (for example, on a website for the industry in which the company operates, or a trade publication for that industry) or, in its absence, in a publication of national circulation. A notice of the decision will also be publicly posted, for a minimum period of 30 days, at the company’s principal place of business, or at the place where the activity is carried out, and on the company’s website.

In terms of civil penalties, the penalties under the Public Improbity Law for individuals and legal entities engaging in certain corrupt practices to the detriment of Brazilian public entities are the following:

- Fines ranging from the value of the unlawful benefit obtained, up to double that amount.
- Forfeiture of assets or amounts obtained by means of the misconduct.

- Full compensation by way of damages to be paid to the public entity suffering the detriment.
- Suspension of political rights (that is, the right to vote and to exercise a public mandate) for up to 14 years.
- Prohibition on the individual or legal entity contracting with public entities or receiving any public benefit or incentive from government institutions for up to 14 years.

The civil penalties prescribed by the Clean Company Act for a company found to have engaged in corrupt practices are the following:

- Confiscation of assets.
- Suspension of the company's activities.
- Compulsory dissolution of the company.
- Debarment from receiving tax or other incentives and loans from public entities and publicly held financial institutions from one to five years.

Anti-Corruption and Anti-Bribery Provisions in a Loan Agreement

A loan agreement providing for a loan to a borrower in Brazil typically requires the obligors to represent that:

- They are familiar with and will comply with all applicable anti-corruption laws and regulations (including the Brazilian Criminal Code, the Public Improbity Law, the Clean Company Act and the Public Tender Law, as applicable).
- No unlawful payment (in violation of anti-corruption and anti-bribery laws or regulations) has been made or received by the borrower, its representatives, officers, managers, or employees.

Some financing agreements may also require the obligors to represent that they have anti-corruption policies in place, which comply with the Brazilian laws and regulations, and that the obligors are in compliance with those policies.

Breach of these representations typically entitles the lender to accelerate the loan.

Currency Exchange Controls

Payments to foreign lenders are allowed under a loan agreement and associated security or guarantee documents without limitation on the amounts involved.

Payments made from Brazil to a foreign lender must be carried out through an institution authorized by the Central Bank to operate in the exchange market. They must also comply with other foreign exchange requirements provided for in Resolution No. 277/2022 of the Central Bank, and Resolution No. 5.042/2022 of the CMN. In addition, certain credit operations, such as loans equal to or exceeding USD1 million (or the equivalent in other currencies), must be notified to the Brazilian Central Bank through its information system under Resolution No. 278/2022 of the Central Bank.

Restrictions on Making Loans, or Taking Security or Guarantees

Restrictions on Making Loans

There are no restrictions on the making of loans by foreign lenders (regardless of whether they are banks or non-banks) to borrowers in Brazil.

However, the making of loans by foreign lenders to Brazilian public entities (governmental bodies and state-owned companies) depends on regulatory procedures set out in the Complementary Law No. 101/2000 (*Lei de Responsabilidade Fiscal*). These regulatory procedures are intended to control the indebtedness of the public sector.

For more information, see Country Q&A, Lending and Taking Security in Brazil: Overview.

Restrictions on Taking Security or a Guarantee

There are generally no legal restrictions on the granting of guarantees or security over any form of asset to foreign lenders.

The exception to this is fiduciary assignments (*alienação fiduciária*). This form of security entails the transfer of ownership of the asset to the creditor with the transfer being automatically reversed upon payment of the secured debt. Traditionally, non-Brazilian creditors have not been allowed to take this form of security as it was created by legislation referring to the Brazilian financial system alone.

However, the inability to take a fiduciary assignment is now of little relevance in practice, because the Brazilian Civil Code has created a form of fiduciary security which has the same characteristics as the fiduciary assignment. This other form of security is called fiduciary ownership (*propriedade fiduciária*) and it is intended to be available to all lenders, whether Brazilian or foreign (as confirmed by Appeal No. 2078905-92.2017.8.26.0000, judged in October 2017 by Hamid Bdine, Cesar Ciampolini and Carlos Dias Motta).

There was also, until recently, uncertainty as to whether security could be granted over rural property or real estate in favor of a foreign creditor, but Law No. 13,986 of April 7, 2020 now expressly permits the granting of this security.

For more information, see Country Q&A, Lending and Taking Security in Brazil: Overview.

Restrictions on Enforcing Rights Under a Loan Agreement

Enforcing a Foreign Court Award in Brazil

If the parties decide to submit claims arising from the loan agreement to a foreign jurisdiction, enforcement of the foreign court's judgment or award in Brazil is possible only after recognition by the Superior Justice Court. The Superior Justice Court will recognize a foreign court award only if the following are satisfied:

- The judgment fulfills all formalities required for its enforceability under the laws of the country where it was issued.
- The service of process instituted against a Brazilian resident party is effected in accordance with Brazilian law.
- The judgment was issued by a competent court after due service of process upon the parties to the action.
- The judgment is not subject to appeal.
- The judgment was authenticated by a Brazilian consulate in the country where the same was issued or, if the judgment was issued in a jurisdiction that adopted the Hague Convention abolishing the legalization for foreign public documents, was apostilled.

- The judgment is accompanied by a sworn translation of it into Portuguese.
- The judgment is not against Brazilian national sovereignty, public policy, or morality.

Foreign Lender Enforcing in Brazilian Courts

To commence a court proceeding in Brazil, a foreign lender will be required to provide a bond (cash, bank guarantee or other assets) to secure the payment of costs and legal expenses incurred by the defendant, unless the claimant owns real estate in Brazil of sufficient value to cover the likely costs and expenses.

A bond is, however, not required in the case of enforcement proceedings based on any of the following:

- An extrajudicial title. Extrajudicial titles are debt instruments that the creditor may enforce against the debtor with no need for a previous court action to ascertain the debt. Examples of extrajudicial titles are agreements signed by the parties and two witnesses, and secured loan agreements.
- The enforcement of a court decision.
- The filing of a counterclaim.
- Where an international treaty so provides.

The Superior Justice Court has also waived this bond requirement for the following:

- Plaintiffs who, although being incorporated outside Brazil, have appointed agencies, subsidiaries, or branches in Brazil (Superior Justice Court, Special Appeal No. 1.584.441/SP, 21 August 2018).
- Enforcement of foreign awards in Brazil through the recognition proceeding explained above (see Enforcing a Foreign Court Award in Brazil) before the Superior Justice Court (Disputed Foreign Awards No. 507-EX (2005/0209540-1), 18 October 2006).

In addition, a bond for commencing proceedings in Brazil is not required in the case of claimants incorporated in certain European countries, as a result of bilateral agreements entered into between Brazil and, for example, France (Decree No. 3,598/2000) and Italy (Decree No. 1,476/1995).

Restrictions on Enforcing Security

There are no restrictions on enforcing security except that non-Brazilian creditors have not been allowed to enforce a fiduciary assignment. However, enforcement of fiduciary ownership is allowed for non-Brazilian creditors. For more information, see Restrictions on Taking Security or a Guarantee.

For more information on enforcing security, see Country Q&A, Lending and Taking Security in Brazil: Overview.

Doing Business Requirements

A foreign lender will not be considered to be doing business in Brazil solely because of the execution or performance of a loan agreement with a Brazilian borrower.

For more information, see Country Q&A, Doing Business in Brazil: Overview.

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