PANORAMIC

FUND FINANCE 2024

Contributing Editors

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Debevoise & Plimpton

LEXOLOGY

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Panoramic guide (formerly Getting the Deal Through) enabling side-by-side comparison of local insights, including into structure and purpose of fund financings; transaction parties; due diligence; credit support; borrowing base; financing documentation terms; remedies and enforcement; other legal and regulatory issues; and recent trends.

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Global overview

Ramya S Tiller, Michael P McGuigan, Victoria G J Brown and Miju Damodar

Debevoise & Plimpton

The first half of 2023 was, to put it mildly, an interesting time in the fund finance market. The impending failures of Silicon Valley Bank, Signature Bank and First Republic Bank – all notable lenders in the fund finance space – sent fund borrowers scrambling to navigate covenants and restrictions in their credit facilities with these banks, and searching for alternative credit sources. At the same time, investors rightfully expressed concerns about funding contributions into deposit accounts at these banks, putting fund borrowers in the uncomfortable position of choosing compliance with credit facility covenants over the interests of their investors. But the crisis was short-lived, and the credit facilities largely performed with relatively minimal disruption despite market upheaval and uncertainty. Deal volume quickly rebounded and is continuing along its upward trend, as there continues to be strong demand from funds to fill their liquidity needs.

However, the bank lenders that traditionally have been major players in the fund finance market continue to be buffeted by a series of macroeconomic events – including the increase in interest rates and regulatory changes in capital treatment – and remain more selective with credit extensions. This trend started in the latter half of 2022 and persists today. As a result, credit demands go unmet, particularly in the case of newer sponsors, and the need for alternative and additional liquidity sources has become apparent, even for seasoned sponsors.

These recent challenges in the fund finance market are creating opportunities. We're seeing a lot of innovation in the fund finance space, with novel and bespoke financing structures, and many new entrants on both the borrower and lender sides of the table.

In addition to subscription facilities, we saw the continued popularity of back leverage loans and net asset value (NAV) facilities, and a growth in private equity NAVs and management company and general partner-level financings. With the leveraged finance markets disrupted, sponsors increasingly turn to these products to consummate acquisitions, purchase portfolio company debt and make distributions to limited partners in view of delayed exits from portfolio companies. Conditionality for these structures also continues to evolve, with some lenders willing to consider providing these facilities with limited conditions similar to that for operating company-level facilities. We also saw more alternative fund finance credit providers offering these facilities.

We also continue to see increased focus on syndication efforts, via assignment or participation. Lenders are also looking to readjust their balance sheet exposures by means of swaps, financial guarantees or other similar transactions. Accordingly, market players have been revisiting the relevant provisions in their facility documents to accommodate these processes.

Sponsors continue to raise capital from insurance companies and similar investors. While 2023 has seen a slowdown in activity in view of market conditions and uncertainty over US regulatory developments, we expect rated feeder structures and other structured products,

such as collateralised fund obligations, to continue to evolve and develop. If history is any guide, innovation in the fund finance market will continue as long as sponsors have unmet liquidity needs.

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STRUCTURE AND PURPOSE OF FUND FINANCINGS

Financing structures

1 What types of financing structures are common in your jurisdiction? Are other types of credit facilities available for funds? What are the purposes of each (eg, management fee facilities, general partner financings)?

Investment funds in Brazil are generally prohibited from borrowing money (article 101, insert II of Resolution No. 175, of 23 December 2022, from the Brazilian Securities Commission – *Comissão de Valores Mobiliários* or 'CVM'.

For this reason, fund financings are typically raised outside Brazil by the fund's investors, with proceeds being contributed to the fund in the form of subscription or acquisition of shares. Such foreign financings follow the structures and types of credit facilities available abroad, and are outside the scope of this chapter.

The aforesaid prohibition is subject to the following exceptions:

- loans taken by the fund to cover the fund's negative net worth;
- loans taken by the fund to meet the default of shareholders who fail to pay in the shares they subscribed for, noting that the value of the loan is limited to the amount necessary to ensure compliance with the commitment of investment previously assumed by the fund or to guarantee the continuity of the fund's operations;
- loans or financings made by governmental development entities (such as development banks and multilateral organisations) to private equity funds (FIPs), noting that the value of the loans and financings is limited to 30 per cent of the respective fund's portfolio; and
- loans made in financial assets and transferred through systems approved by local regulators, an exception wide enough to allow acquisition of financial assets with liquid funds that would otherwise be used for a direct loan or financing.

Law stated - 26 December 2023

Fund structure

2 What does a typical fund structure look like and where might different types of financing sit in a typical fund structure? How are the various entities within a fund group structured? Are financing techniques used as a fund-raising vehicle in your jurisdiction?

A Brazilian investment fund is a pool of resources intended for investment in financial and other assets, constituted in the form of a condominium, with shareholders being co-owners of the assets in the fund's portfolio. The fund is not a separate legal entity (such as a corporation or an association).

The main entities involved in a fund formation and operation are the administrator and the portfolio manager. The fund may have advisory, technical or investment committees,

and must contract certain other technical services such as assets' custodians and an independent auditor.

Brazil relies extensively on local feeder funds, that are formed for investing in quotas of the final funds directly accessing markets. Such feeder funds frequently invest in several funds of the same class, enabling indirect investors to spread risk among several portfolio managers and/or strategies. Certain funds may also invest in business entities that accept co-investors, this being typically the case for local private equity funds.

Considering the general prohibition on taking loans and financings by Brazilian investment funds, there are no specific financing techniques used for fundraising in Brazil. Fund financings are typically raised outside Brazil by the fund's investors, with proceeds being contributed to the fund in the form of subscription or acquisition of shares.

Law stated - 26 December 2023

Financing considerations for fund formation

3 | What financing considerations are particularly relevant during fund formation?

Considering the general prohibition on taking loans and financings by Brazilian investment funds, there are no particularly relevant financing aspects to be considered in Brazil during fund formation.

Law stated - 26 December 2023

Use of proceeds

4 | What are the proceeds of fund financings most typically used for? Has this evolved in recent years?

Fund financing in Brazil is permitted only in very limited cases. In such limited cases, the proceeds must be used for the following purposes respectively:

- to cover the fund's negative net worth;
- to comply with the obligation of the defaulting shareholder to pay in its subscribed shares;
- to make investments permitted by the by-laws of the FIP that receives loans or financings provided by governmental development entities;
- loans made in financial assets and transferred through systems approved by local regulators, an exception wide enough to allow acquisition of financial assets with liquid funds that would otherwise be used for a direct loan or financing, may be used for any lawful purpose that is in accordance with the fund's by-laws.

The first case above has recently been introduced into Brazilian regulation. Before 2 October 2023, the date on which CVM Resolution No. 175/2022 entered into force, a fund's

negative net worth had to be covered by capital contribution of the shareholders and not by loans or financings.

Law stated - 26 December 2023

TRANSACTION PARTIES

Credit support

5 Which entities within a fund group provide collateral and guarantee support for the different types of financings? Are there restrictions on which entities are permitted to provide such support for each type of financing?

Within the limited cases in which Brazilian investment funds may take financings, the fund itself may provide collateral over the respective fund's assets to secure such financings. In addition to that, other entities such as the fund's shareholders and the companies invested by the FIP may provide collateral and guarantee support to the financings.

Law stated - 26 December 2023

Recourse

6 Are fund financings typically fully recourse to the obligors? Are there credit parties against whom recourse will ordinarily be expressly limited, whether for regulatory reasons or by virtue of customary practice?

Within the limited cases in which Brazilian investment funds may take financings, such financings are fully recourse against the fund itself or, in the case of funds with different classes of shares, against the respective class that took the financing.

Because Brazilian investment funds are not separate legal entities, the fund's shareholders are, in principle, subsidiarily liable for the fund's obligations, including obligations arising from financings taken by the fund. However, the fund's by-laws may limit such liability to the value of the shareholder's shares in the fund (article 1,368-D, insert I, of the Brazilian Civil Code; article 18 of CVM Resolution No. 175/2022). In this case, there will be no recourse against shareholders.

The fund's service providers – such as the administrator and the portfolio manager – are not liable for the fund's obligations, including obligations arising from financings taken by the fund, except in case of losses caused by the service provider's wilful misconduct (article 1,368-E of the Brazilian Civil Code; article 18, sole paragraph of CVM Resolution No. 175/2022).

Law stated - 26 December 2023

Liability

7

Where multiple fund entities are borrowers or guarantors, is joint and several liability typical, or is each entity liable only for its own obligations?

Typically, each fund entity is liable for its own obligations only, joint and several liability depending on express agreement. If the fund has different classes of shares, each class is typically responsible for the obligations incurred to the benefit of that class only.

Law stated - 26 December 2023

Lenders

8 What types of lenders typically provide fund finance products? Does this vary for different fund finance products? Are there any recent trends in the types of lenders entering or stepping back from the fund finance space?

Within the limited cases in which Brazilian investment funds may take financings, typical lenders are banks. In the case of FIPs, lenders may also be governmental development entities, such as multilateral organisations.

Law stated - 26 December 2023

DUE DILIGENCE

Constituent documents

9 What are the typical fund constituent documents that require diligence? What are the most important issues to be considered in reviewing these?

The basic constituent document of a Brazilian investment fund is the fund's by-laws (- *regulamento*). When reviewing it, one should first check whether the fund is properly registered with the CVM and whether the by-laws comply with the relevant provisions of CVM Resolution No. 175/2022.

The most important provisions to be considered in reviewing the by-laws include:

- the fund's investment policy,
- whether the fund has different classes of shares and, if yes, whether the classes are properly segregated;
- the target investors;
- whether the investors' liability is limited to the value of their respective shares – in the absence of such limitation, investors are subsidiarily liable for the fund's obligations;
- the conditions for subscription and redemption of shares;
- the management fee and other fees;
- subscription agreements or other forms of investment commitment; and
- whether the by-laws permit the fund to take loans and financings, in the limited cases in which such taking is admitted by CVM regulation.

Law stated - 26 December 2023

Side letters

10 Are side letters between the fund parties and investors typical? What side letter provisions most commonly raise issues that may affect financings?

Side letters in Brazil are not as common as in other jurisdictions. Side letters in Brazil may provide restrictions on investments in certain activities or sectors (for example, games, tobacco or weapons), but these restrictions should ideally be included in the fund's by-laws. If they are, litigation against the restrictions by disgruntled fund shareholders would stand better (but by no means absolute) chances of success. In any case, side letters must not contravene the fund's by-laws and must respect the general principle that shareholders of the same class must be treated equitably.

Law stated - 26 December 2023

Investors

11 What is the typical scope of diligence performed on investors? Do investors commonly provide investor letters or other deliverables for the benefit of lenders? If so, in what context would this be expected?

Lenders, in the restricted cases in which loan finance is allowed, would need to analyse financial information on the fund's creditworthiness. This might, in the case of more substantial loans, include in the case of real estate or private equity fund: (1) information on business invested by the fund, their prospects and main contingencies, and (2) environmental risk analysis. These aspects are important since labour and environmental liability may pierce the corporate veil in Brazil and attain the fund and its general assets.

A second topic of analysis would be anticorruption and money laundering aspects. This is especially important since Brazilian legislation holds financers liable for damages in relation to corruption and related money laundering. As a result, the lender itself could be held liable to indemnify parties wronged by corruption.

This due diligence may be made by direct analysis. This said, the fund administrator must perform anti-money laundering diligence on the investors pursuant to Law No. 9,613, of 3 March 1998 (and its administrative regulation (CVM Resolution No. 50, of 31 August 2021, and Circular No. 3,978, of 23 January 2020, from the Central Bank of Brazil). Thus, questions may be addressed to such service provider, being only extended to investors if the answers presented are less than satisfactory. In this latter case of an unsatisfactory answer, investor letters stating compliance with money laundering and anticorruption laws might be useful to evidence the good faith of the lender, and be requested from all shareholders or from a representative sample of them.

Such letters might also profitably be obtained if the fund has a sole investor or a limited number of investors, particularly if linked by a business or family relationship.

Law stated - 26 December 2023

Other areas of due diligence

12 | Are there other areas that merit due diligence considerations? What salient issues are relevant to each?

The anti-money laundering due diligence performed by the fund administrator on the investors is also intended to combat terrorism financing, as per applicable regulation. Liability for breach of such rules would not ordinarily extend to the lenders and this is not ordinarily an area of concern in Brazil. Thus, due diligence in this area would typically not be pursued or be restricted to questions presented to the fund administrator.

Law stated - 26 December 2023

CREDIT SUPPORT – GUARANTEES, SECURITY AND COLLATERAL

Guarantors – subscription facilities

13 | Which entities are typically obligors in the case of subscription facilities?

Given that Brazilian investment funds are generally prohibited from borrowing money (with a few limited exceptions), subscription facilities are typically granted to the investors and not to the fund, with proceeds being contributed to the fund in the form of subscription or acquisition of shares. Therefore, investors or vehicles specifically formed by them are typically obligors in subscription facilities. Such vehicles may be formed in Brazil or outside this country. If formed outside Brazil, they avoid restrictions on the taking of loans and may take the form of feeder funds, subsequently investing in shares of the local fund. The feeder funds may do that taking advantage of tax rules that ensure tax advantages such as the exemption from capital gains tax upon the sale of the Brazilian fund's shares.

However, the fund itself may be an obligor if exceptions to the prohibitions of its taking loan finance apply. Such exceptions are:

- loans taken by the fund to cover the fund's negative net worth;
- loans taken by the fund to meet the default of shareholders who fail to pay in the shares they subscribed for, noting that the value of the loan is limited to the amount necessary to ensure compliance with the commitment of investment previously assumed by the fund or to guarantee the continuity of the fund's operations;
- loans or financings made by governmental development entities (such as development banks and multilateral organisations) to private equity funds, provided that the value of the loans and financings is limited to 30 per cent of the respective fund's portfolio; and
- loans made in financial assets and transferred through systems approved by local regulators, a rule that would enable any funds to be lent after being previously exchanged for financial assets, and thus be used for such loans in a wider variety of cases than those above.

Law stated - 26 December 2023

Guarantors – NAV facilities

14 | Are pledged assets typically held at the fund level and pledged directly, or moved to a special purpose vehicle? Is there fund-level recourse in the case of NAV facilities?

Similarly to subscription facilities, typical NAV facilities would not exist in Brazil, since funds cannot take loans. This prohibition will however not apply if i) the loan is made by governmental development entities (such as development banks and multilateral organisations) to private equity funds, limited to 30 per cent of the fund's portfolio; or ii) loans are made in financial assets and transferred through systems approved by local regulators, a rule that would enable any funds to be lent after being previously exchanged for financial assets, and thus be used for such loans in a wider variety of cases than those above. To our knowledge operations of this kind are not common in Brazil, but if undertaken collateral might be tendered by the fund itself or through a special purpose vehicle organised by the fund, if this is enabled by its by-laws and applicable regulation.

Law stated - 26 December 2023

Collateral package – subscription facilities

15 | What is the typical collateral package for subscription facilities?

Whereas pledge and mortgage of assets exist in Brazil, collateral would typically take the form of fiduciary collateral, under which provisional ownership of fund assets is transferred to the creditor until the debt is repaid. The assets in question might be any of those held by the fund, including financial assets, shares, the right to bank accounts and even real estate. Grantors of such collateral may also be shareholders of the fund, rather than the fund itself, in which case the shares in the fund themselves, along with other assets under the ownership of the shareholder, might serve as collateral.

Law stated - 26 December 2023

Collateral package – NAV facilities

16 | What underlying assets most commonly secure NAV facilities?

The security package may include a simple or a fiduciary pledge of assets (such as bank accounts, receivables, real estate and shares) held by the fund.

Law stated - 26 December 2023

Pledge structure – subscription facilities

17 Which parties are typically required to pledge capital-call collateral and how are the pledges structured?

A pledge may be offered by the fund itself in the cases in which it can take a loan. Typically in Brazil a fiduciary pledge would be used, pursuant to which the ownership of the collateralised asset is transferred to the creditor until the debt is repaid. An alternative and less common form is the common pledge, in which a right to foreclose in the case of default is granted to the creditor.

Law stated - 26 December 2023

Pledge structure – NAV facilities

18 If assets are held in a special purpose vehicle (SPV), are the assets pledged directly by the SPV, or is the pledge achieved indirectly through a pledge of equity interests in the SPV? Are any other pledge structures commonly seen?

Should the security package include assets held by a Brazilian SPV, the assets are typically pledged directly by the SPV. An additional pledge over the shares of the SPV is also possible if the SPV is held by a holding company in which the fund invests and not directly by the fund; a pledge over the SPV shares held directly by the fund is not possible because the fund is not permitted to secure obligations of its shareholders.

Alternatively to a simple pledge, the security may take the form of a fiduciary pledge, which is a stronger form of security available in Brazil, entailing transfer of ownership of assets to the creditor until the debt is repaid.

Law stated - 26 December 2023

Perfection and priority – subscription facilities

19 How are security interests in rights to uncalled capital and bank accounts perfected and how is priority established? Is any notice to investors necessary for perfection or priority and, if so, what are the requirements for such notices? In the case of bank accounts, is a tripartite account control agreement with the account bank, or other notice to or acknowledgement by the account bank, required?

Security interest granted in Brazil (eg, by an invested company) is perfected upon registration of the security agreement with the relevant public registrar's office. Such registration establishes the priority as regards other creditors. Notice to investors is not necessary for perfection or priority.

In the case of bank accounts, a notice to or an acknowledgement by the bank is required for the security interest to be effective against the bank. A tripartite account control agreement is not required by law, but the security agreement often requires an acknowledgement of the bank to the effect that the bank will follow the instructions of the lenders after a notice of default.

Law stated - 26 December 2023

Perfection and priority – NAV facilities

20 How is a security interest in each type of commonly pledged asset perfected, and how is its priority established?

Security interest granted in Brazil is perfected upon registration of the security agreement with the relevant public registrar office, such registration establishing the priority as regards to other creditors.

Law stated - 26 December 2023

Lien searches and filing system

21 How can a lender assure itself as to the absence of liens, with or without priority to its lien, with respect to each type of collateral? Is a public filing or recordation system available in your jurisdiction to notify third parties of security interests?

A lender can request statements issued by the public registrar offices in the places where the head offices of the borrower or security provider and/or the collateral are located, to verify whether security liens are registered in the name of the borrower or security provider or, in the case of collateral over real estate, if security liens are registered in the real estate records.

Law stated - 26 December 2023

BORROWING BASE

Capital-call collateral value

22 How is the typical investor base determined in the case of subscription facilities? What are the typical events during the life of a credit facility that would exclude investors from the borrowing base? What are the common underwriting issues for lenders with respect to investor creditworthiness?

The base would normally be the sum of all outstanding credits of the fund related to subscription commitments. Typical events leading to exclusion of investors from the borrowing base would be (1) cancellation of their commitment due to determination of the regulator, (2) investors default in meeting prior commitments, leading to the subsequent exclusion of still unmatured commitments, and (3) any other cause leading to cancellation of commitments.

Law stated - 26 December 2023

Asset concentration limits

23 For NAV facilities, are there typically limits on exposure to various types of assets within the collateral pool? How are these limits determined?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, the more liquid the assets, such as credits, the better the collateral. As for shares in companies they represent a higher risk due to price volatility.

Law stated - 26 December 2023

Asset valuation

24 For NAV facilities, what is the typical process for collateral valuation? What dispute mechanics are available?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, illiquid collateral is normally independently appraised by the lender prior to the execution of the loan documents. The lender may use a third-party appraiser for this exercise, the characteristics of which will vary according to the assets being appraised.

Law stated - 26 December 2023

FINANCING DOCUMENTATION TERMS

Financial covenants

25 What are the principal types of financial covenants in the case of NAV facilities? Are any financial covenants typically included in subscription facilities?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, lenders would be well advised to include as covenants a maximum ratio (1) between the fund's indebtedness and the assets of the fund consistently and periodically appraised and (2) between indebtedness and the net worth of the fund.

Law stated - 26 December 2023

Other covenants

26 What other covenants restricting the operation of a fund are commonly included in financing documentation?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, possible covenants might include:

- withholding of payments to investors and service providers of the fund until repayment;
-

impossibility of any additional investment of capital by the fund while the debt is matured and outstanding; and

- pari passu and negative pledge clauses.

Law stated - 26 December 2023

Repayment – subscription facilities

27 What is the typical maturity of a subscription facility? How long can individual loans remain outstanding?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, and considering that loans would typically come from the financial sector, standing banking practice would impose regular periodic payments, possibly starting after a fixed maturity period sufficient for some of the fund's investment to mature.

Law stated - 26 December 2023

Repayment – NAV facilities

28 What is the typical maturity of a NAV facility, and what are the typical mandatory prepayment triggers? Are there customary exceptions? Are penalties for voluntary prepayment typical?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, and considering that loans would typically come from the financial sector, standing banking practice would impose regular periodic payments, possibly starting after a fixed maturity period sufficient for some of the fund's investment to mature. Mandatory prepayment would occur if financial or other covenants are violated. As for voluntary prepayment, it is common that loan agreements proposed by banks stipulate that they shall not be possible, or subject them to indemnification of a decrease in remuneration that will be suffered by the lender if funds are replaced in a less favourable market.

Law stated - 26 December 2023

REMEDIES AND ENFORCEMENT

Defaults

29 What are the commonly included events of default specific to fund financings?

The by-laws of many funds often include key person and termination of investment manager events, and these events may be used to trigger an event of default in the loan. In addition to those, breach of covenants (financial or otherwise) and representations may lead to the same result.

Law stated - 26 December 2023

Standstill

30 What types of standstill provisions are typically available in the case of subscription facilities?

Such facilities are uncommon in Brazil and so far no established practice has developed. This said, a typical standstill provision in line with international loan practice would foresee a term of 10 to 22 business days.

Law stated - 26 December 2023

Enforcement – capital calls

31 How does a lender enforce its right to call capital from investors in the case of a defaulted subscription facility?

For this purpose, the investor should be notified of the collateralisation of its debt by the lender, in a notification including a copy of the loan agreement and precise payment instructions. Non-compliance with the request would lead to judicial debt foreclosure.

Law stated - 26 December 2023

Enforcement – NAV facility collateral

32 What steps must a lender take to foreclose on pledged underlying assets, including in cases where assets are pledged indirectly through a pledge of equity interests in a holding company?

If the security package includes a pledge or fiduciary pledge over assets in Brazil (eg, assets held by an invested company), the lender must sell the collateral and apply the sale proceeds to the satisfaction of the secured debt, returning any excess to the security provider. Brazilian law bans any provision in the security agreement intended to permit the lender to hold the collateral, but after the debt matures and remains unpaid lender and security provider may agree on the transfer of the collateral to the lender in satisfaction of the debt.

The collateral sale may be effected at the lender's choice in a private sale, if so permitted by the collateral agreement or by law. In the absence of such permission, the sale must be effected in an in-court auction.

Prior to the collateral sale, it may be necessary for the lender to take physical possession of the collateral. In this case, unless the holder of the collateral delivers it voluntarily to the lender (or to a lender's representative), a judicial constraint is necessary since Brazilian law prohibits a lender from taking possession by its own assets held by third parties.

Law stated - 26 December 2023

Enforcement – bank accounts

33 What steps are needed for a lender to take control over funds or securities held in pledged accounts?

Security agreements over bank accounts or securities in Brazil typically include an acknowledgement of the bank to the effect that the bank will follow the instructions of the lender after a notice of default. If this is the case, a notice from the lender to the bank normally is sufficient to cause the bank to transfer the funds or securities to the lender. After that, the lender must sell the securities to third parties, apply the sale proceeds to the satisfaction of the debt and return any excess to the security provider.

If there is no such bank acknowledgement, or if the bank does not voluntarily transfer the funds or securities to the lender, the lender should seek a court order constraining the bank to deliver the funds or securities to it, after which the securities must be sold and proceeds applied to satisfaction of the debt.

Law stated - 26 December 2023

Bankruptcy and insolvency

34 How do bankruptcy and insolvency proceedings in respect of a fund affect the ability of a lender to enforce its rights as a secured party over the collateral? Are processes other than court proceedings available to seize pledged assets in enforcement?

A Brazilian investment fund is subject to insolvency proceedings only if its by-laws limit the liability of each investor to the value of its respective shares (article 1,368-E, paragraph 1, of the Brazilian Civil Code; article 122 of CVM Resolution No. 175/2022). In the absence of such limitation, the investors are subsidiarily liable for the fund's obligations and the fund itself cannot be declared insolvent.

Declaration of insolvency of a fund affects lenders that lent money directly to the fund in the limited situations in which the fund can take loans. Such lenders will compete with other creditors of the fund (1) as secured creditors if the loan is secured by a pledge or mortgage, meaning that the lender will be paid before unsecured creditors and other preferred creditors but *pari passu* with other secured creditors; and (2) as unsecured creditors if the loan is unsecured (or with respect to the part of the credit that exceeds the collateral value), meaning that the lender will be paid after secured and other preferred creditors and *pari passu* with other unsecured, non-preferred creditors. In both cases, enforcement takes place within the court insolvency proceeding.

Credits secured by fiduciary pledges (transfer of ownership of collateral to the creditor, to be unwound if debt is paid) should not, however, be affected by the insolvency. This is because, in this case, the lender is the owner of the collateral, therefore the collateral does not form part of the insolvency estate. Such lenders can enforce the collateral in a court proceeding or out of court, by means of a private sale, at the lender's choice. The part of the

credit that exceeds the collateral value, however, is subject to the insolvency proceeding as unsecured, non-preferred credit.

The fund insolvency should not affect lenders that provided credit directly to the investors in the fund. However, the possibility of investment funds being subject to insolvency proceedings is new in Brazil (a provision to this effect was introduced in the Brazilian Civil Code in September 2019 and regulated by CVM Resolution No. 175/2022, which became effective in October 2023) and to our knowledge was not tested in court yet. Therefore, we cannot completely rule out the risk of a court extending the insolvency of a fund to its shareholders or to invested companies that provided security to the loan, based on a substantial consolidation doctrine, disregard of legal entity or similar doctrines. In this case, lenders would be subject to the rules described in the preceding paragraphs of this answer.

Law stated - 26 December 2023

LEGAL AND REGULATORY ISSUES

Relevant regulatory and statutory regimes

35 Are there any regulatory or statutory regimes that raise particular issues for lenders or fund sponsors in fund financings? How are these issues normally addressed?

No.

Law stated - 26 December 2023

Governing law

36 What is the typical choice of law and choice of jurisdiction in the finance documentation? What conflict-of-laws considerations are typically relevant to fund financings in your jurisdiction?

Financing agreements are typically subject to the laws and jurisdiction of the place of incorporation of lenders (typically outside Brazil). Personal guarantees typically follow the law of the financing agreement, but in some cases they are provided in a separate instrument governed by the laws of the country of the guarantor. Security over assets in Brazil is subject to Brazilian law and courts even if the financing agreement is governed by foreign law.

Relevant Brazilian conflict of law considerations are typically the following:

- financing agreements and guarantees must be signed by the parties or at least by the last signing party in the country whose laws are chosen to govern such documents, as a condition to validity in Brazil of the choice of law clause (article 9 of Decree-Law No. 4,657, of 4 September 1942);
- the fiduciary pledge (a form of pledge entailing transfer of ownership to the creditor, to be unwound upon repayment of the debt) and the mortgage are governed by

the laws of the country in which the collateral is located (article 8, main part of Decree-Law No. 4,657/1942); and

- the pledge is governed by the laws of the place where the person holding the collateral is domiciled (article 8, paragraph 2 of Decree-Law No. 4,657/1942).

The second rule tends to attract Brazilian law to collateral over Brazilian assets, since the fiduciary pledge and the mortgage tend to be the typical forms of security adopted by professional lenders in Brazil.

Law stated - 26 December 2023

Document execution

37 What are the requirements and formalities for the execution of financing documentation? Are there any jurisdiction-specific issues that arise in the fund financing context?

Documents in a foreign language must be translated into Portuguese by a sworn translator in order to ensure their admission before courts in Brazil. In addition to said translation, foreign documents must

- have the signatures of the parties thereto notarised by a notary public licensed as such under the law of the place of signing and (1) the signature of the notary public must be authenticated by a consular official of Brazil, or (2) if the document is covered by the Hague Convention abolishing the legalisation for foreign public documents, be apostilled; and
- be registered together with their sworn translation with a registrar of deeds and documents in Brazil.

In addition to the foregoing, security agreements and mortgage deeds must be registered with the competent public registrar offices in Brazil in order to create a valid and perfected security lien over the collateral.

A mortgage must be created by a notary deed (except mortgages over very low value real properties, which typically are not part of a security package).

The aforesaid translations, notarisations, authentications, apostilling, registrations and deeds are subject to fees, the value of which depends on the transaction value, the type or security and the place of registration, among other factors.

Foreign capital remitted to Brazil as loans, financings or investment in funds is subject to delivery of information to or registration with the Central Bank of Brazil.

Law stated - 26 December 2023

UPDATE AND TRENDS

Key trends and developments

38 What are the most noteworthy recent trends and developments in fund finance in your jurisdiction? What developments are expected in the coming year?

Considering the limitations on fund finance in Brazil, there are no noteworthy recent or expected trends and developments, typical environmental, social and corporate governance or sustainability-linked loans provisions or typical key performance indicators.

Law stated - 26 December 2023

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