

Brazil



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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?

According to Article 227 of the Brazilian Civil Code, any contract with a value greater than R\$7,100.00 (approximately US\$4,000.00) must be undertaken in writing. Nonetheless, even in contracts that have a smaller value, it is advisable to have the relevant agreement evidenced in writing in order to facilitate its enforcement in a court of law.

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 so-called ‘duplicate’ of the invoice (*‘duplicata’*, in Portuguese), which, 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 and would in such circumstance constitute sufficient evidence of indebtedness.

A receivable contract can be deemed to exist as a result of historic relationships, according to Article 432 of the Brazilian Civil Code.

1.2 Consumer Protections. Do Brazilian 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?

Articles 591 and 406 of the Brazilian Civil Code impose a limit on interest rates charged by non-financial institutions that is equivalent to the rate charged by the government for non-payment of federal taxes. Regarding financial institutions, according to Article 4, IX of Federal Law No. 4.595, dated 31 December 1964, the National Monetary Council, a body that regulates the Brazilian financial system, has the power to limit interest rates. The National Monetary Council issued Resolution No. 1.064, dated 5 December 1985, allowing parties to freely contract interest rates when at least one of the parties is a financial institution.

Brazilian law does not provide a statutory right to interest on late payments, unless there is a penalty clause in the agreement.

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

The Brazilian Consumer Code limits penalties for late payments to a maximum of 2% for all consumer contracts.

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 considered to be a sale of assets made by the government or a government agency and as such is subject to Federal Law No. 8.666, dated 21 June 1993. This statute provides that government sales must be undertaken through a public auction in accordance with the procedure described in the statute.

Furthermore, restrictions are imposed by law on the raising of debt finance by the federal and state governments. For such purpose, the raising of finance is to be understood as any operation incurring payment liability on the government entities in question. Whereas in a normal receivables contract no liability for the assignor that is a government entity would arise, liability might arise via a clause in which the seller accepts liability for non-performance of the assigned credits. This clause should thus be avoided.

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 that is available only to the benefit of public entities. The purchaser may only collect the receivable directly against the obligor in case the sale has been 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 and will be subject to the following specific rules, among others: (a) the claimant (either the seller or the purchaser) will not be granted the right to attach or seize any obligor’s asset; (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).

As a long roster of exceptions to the rules above may apply in relation to government-originated credits, 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 Brazil that will determine the governing law of the contract?

According to Article 9 of Decree-Law No. 4.657/42, an obligation is governed by the law of the place where the contract is executed. 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 signature was made towards its execution.

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 Brazil, and the transactions giving rise to the receivables and the payment of the receivables take place in Brazil, and the seller and the obligor choose the law of Brazil to govern the receivables contract, is there any reason why a court in Brazil would not give effect to their choice of law?

No. Brazilian law would apply, in accordance with Article 9 of Decree-Law No. 4.657/42.

- 2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor.** If the seller is resident in Brazil but the obligor is not, or if the obligor is resident in Brazil 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 Brazil 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 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 Brazil?

No. The United Nations Convention on the International Sale of Goods is not in effect in Brazil.

3 Choice of Law - Receivables Purchase Agreement

- 3.1 Base Case.** Does Brazilian 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., Brazil's laws or foreign laws)?

No. Brazilian law does not require the sale of receivables to be governed by the same law as the law governing the receivables themselves.

- 3.2 Example 1:** If (a) the seller and the obligor are located in Brazil, (b) the receivable is governed by the law of Brazil, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Brazil to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Brazil, will a court in Brazil 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, Brazilian courts will recognise the effectiveness of the sale 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.

- 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 Brazil, will a court in Brazil 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 requirements of the obligor's country or the purchaser's country (or both) be taken into account?

Yes, the courts will. Note from our answer to question 3.2 above that the obligor's domicile is not relevant for the analysis.

- 3.4 Example 3:** If (a) the seller is located in Brazil 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 Brazil 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 Brazil's own sale requirements?

Yes, but only in case both the receivables and the receivables purchase agreement are executed in the obligor's country. 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.

3.5 Example 4: If (a) the obligor is located in Brazil 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 Brazil 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 Brazil's own sale requirements?

Yes, Brazilian courts will recognise the foreign sale as long as the receivables purchase agreement has not been executed in Brazil.

3.6 Example 5: If (a) the seller is located in Brazil (irrespective of the obligor's location), (b) the receivable is governed by the law of Brazil, (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 Brazil 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 Brazil and any third party creditor or insolvency administrator of any such obligor)?

Yes, provided that: (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. See also our answer to question 2.1 on the acceptability of pure choice of law.

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.

4 Asset Sales

4.1 Sale Methods Generally. In Brazil 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. Such agreement is normally notified to the obligor and registered with a public notary. These procedures guarantee the effectiveness of the assignment agreement against the obligor and third parties. The customary terminology is "assignment of credit rights".

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 relevant parties.

However, for such sale to be valid and enforceable against the obligor, it is necessary to notify the obligor. Except if otherwise provided under the receivables contract, no approval or authorisation by the obligor is necessary to render the sale valid and enforceable.

Furthermore, the sale of receivables will only be valid and enforceable against third parties if registered at a Public Registry of Titles and Deeds in the city of domicile of both the purchaser and the seller, according to Articles 129 and 130 of Federal Law No. 6.015, dated 31 December 1973.

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 (and other negotiable credit instruments such as cheques and letters of exchange) transfer is made through endorsement, no other formalities of the kind mentioned in our answer to question 4.2 being required. For loans, which are normally evidenced by a written agreement other than a negotiable instrument of credit, the formalities are those described in our answer to question 4.2 above. As for marketable debt securities, if properly registered with the Brazilian securities authorities, they can be freely sold in stock exchanges and/or over-the-counter markets. In the case such registration is lacking, it will be necessary to execute an indenture, which must be registered at the Registry of Companies.

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? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment? 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?

Yes, they must. See our answer to question 4.2 above.

In general, it is not necessary to obtain the obligor's consent for the sale to be effective against him/her. This also holds true in case the receivables contract does not prohibit assignment but does not expressly permit assignment. However, if the receivables contract expressly prohibits assignment, the obligor's prior approval will be necessary. There are no additional benefits to giving notice.

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 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 legal requirements regarding the form the notice must take or how it must be delivered. What is important is to be able to demonstrate that the notice has been effectively delivered.

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 have commenced. Notwithstanding, the moment the notice is delivered, insolvency rules would apply in case the obligor is in such situation. Please refer to our answers in section 6 below.

The notice may apply to specific receivables and to any and all (including future) receivables to the extent that the receivables are identifiable. For example, it is possible to refer to future receivables in the notice if a reference is made to the contract that will originate such receivables. With respect to the identification of the receivables, please refer to our answer to question 4.7 below.

4.6 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Brazil? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Brazil recognises prohibitions 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, restrictions in receivables contracts prohibiting the sale or assignment are enforceable in Brazil. There is no exception to this rule for contracts between commercial entities, for example.

The described sale will not be valid against the obligor and, furthermore, the seller will be liable for breach of contract. Depending on the case, liability for damages can be sought in court in addition to the contractual penalties provided for in the receivables contract.

4.7 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?

The sale document must include information sufficient enough so that the receivables sold can be properly identified. There is no statutory provision as to what type of information on each receivable is necessary, but the lawyers handling the transaction should be careful to make sure that the receivables are correctly described and adequately individualised. Usually, it is common to indicate the following: obligor's name and taxpayer registration number; date of execution of the receivables agreement; and invoice number and payment date. The sale of real estate

receivables should identify not only the receivables but also the relevant real estate. Different kinds of receivables can be sold under the same receivables contract. Receivables sold do not have to share objective characteristics. Simply stating that the seller sells all of its receivables to the purchaser is not sufficient identification of the receivables.

4.8 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this 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; and/or (c) control of collections of receivables 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 of having any effect, the transaction may be considered 'simulated' and thus void under Article 167 of the Brazilian Civil Code. The question is one of fact to be determined via a case-by-case analysis.

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e., sales of receivables as and when they arise)?

Yes. This is common in Brazil.

4.10 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). The organ issued Instruction No. 444, dated 8 December 2006, providing for a new type of 'Fund of Investment in Credit Rights' (*fundos de investimento em direitos creditórios*), or 'FIDC'), called the 'non-standardised' FIDC, which 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 our answer to question 4.7 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 (according to Article 117 of the Brazilian Bankruptcy Law). As a result, discretionary room for a decision regarding the continued validity of the assignment agreement is granted in the case of bankruptcy.

4.11 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?

There is a general principle in Brazil which holds that accessories follow the principal. This means that if a secured credit is assigned, the related security is also assigned. 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 is aware of the sale of the receivables and that he/she 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).

5 Security Issues

5.1 Back-up Security. Is it customary in Brazil to take a “back-up” security interest over the seller’s ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

This is not a regular feature in most transactions. It is, however, an issue that 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 contracts than the final value to be securitised, so that the excess will work as collateral.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Brazil, and for such security interest to be perfected?

Normally a written clause in the agreement assigning the credits would be the ideal means.

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 Brazil to grant and perfect a security interest in purchased receivables governed by the laws of Brazil and the related security?

In the typical case where 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 of the obligor of pledged receivables (Articles 1.452 and 1.453 of the Brazilian Civil Code).

Alternatively, the security might take the form of transfer of fiduciary ownership of the assets (including receivables purchased). The purchaser in this case 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 purchaser (Article 1.361, paragraph 1 of the Brazilian Civil Code). In case the purchaser’s assets include real estate, registration of the lien with the competent real estate registry is also required.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of Brazil, 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 Brazil or must additional steps be taken in Brazil?

Not necessarily, as Article 8, paragraph 2 of Decree-Law No. 4.657/42 provides that the applicable law with regard to *in rem* collateral is the law of the place where the person in possession of the asset is domiciled. 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 beneficiary, typically the seller of the receivables. If they do not, 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?

No relevant change is introduced.

5.6 Trusts. Does Brazil 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, pursuant to Article 627 *et seq.* of the Brazilian Civil Code, 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 Brazil recognise escrow accounts? Can security be taken over a bank account located in Brazil? If so, what is the typical method? Would courts in Brazil recognise a foreign-law grant of security (for example, an English law debenture) taken over a bank account located in Brazil?

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

As mentioned in our answer to question 5.4 above, Article 8, paragraph 2 of Decree-Law No. 4.657/42 provides that the applicable law with regard to *in rem* collateral is the law of the place where the person in possession of the asset is domiciled. As a result, the terms of the collateral should follow the law of Brazil. If they do not, validity of the collateral might be impaired.

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 Brazilian insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a “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?

No. 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., he/she must prove 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.

The same effect of invalidity shall ensue in case an undervalued sale of the receivables was made up to 2 years prior to insolvency being decreed, in this case independently from evidence of the intention of the parties to defraud creditors.

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 is similar to a trust and transfer to a purchaser of 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)?

As we explained in our answer to question 6.1, above, pursuant to the Brazilian Bankruptcy Law, the insolvency official is not vested with the power to stop the agreements executed by the seller from having legal effects. The adequate means to prohibiting 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 Brazil for (a) transactions between unrelated parties and (b) transactions between related parties?

Please refer to our answer to question 6.1 above.

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. Even if the seller sold the whole company or any of its branches or going concerns, the buyer would not be subject to the effects of the insolvency decree; at most, the transaction might be declared ineffective in the cases mentioned in our answer to question 6.1 above.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

With relation to (a), at the very moment insolvency is decreed, the management of the company’s assets is granted to the insolvency official. The receivables may only be sold after judicial allowance.

With regard to (b), pursuant to Article 75 of the Brazilian Bankruptcy Law, once insolvency is decreed, the company’s businesses cease and the seller is removed from his/her commercial activities. Therefore, there will be no future receivables.

In case a judicial reorganisation proceeding takes place instead of an insolvency proceeding, the company’s activities will not cease. In such 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).

7 Special Rules

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

Yes, Brazil has laws and regulations specifically providing for securitisation transactions.

The Brazilian Securities Commission (CVM) issued Instruction No. 356, dated 17 December 2001, to regulate FIDCs, which are receivables funds used as conduit entities for securitisation purposes, and Instruction No. 444, dated 8 December 2006, to regulate a specific type of ‘non-standardised’ FIDC, which refer to receivables that bear a higher risk of payment for various reasons, including receivables which will come into existence after the date of the sale contract.

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 securitisation fund' (*'fundo de investimento imobiliário'*, or 'FII'), under CVM Instruction No. 472, dated 31 October 2008. The securitisation of financial receivables can be 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 undertaken 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 Brazil 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?

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

FIDCs and FIIs funds are investment vehicles that, in Brazil, are not considered as legal entities but 'condominiums' without legal personality that serve as conduits for securitisation purposes. The formation of such funds requires an administrator that must be, in the case of FIDCs, a commercial bank, a multiple bank, the Caixa Econômica Federal (a savings and loans institutions controlled by the Federal Government), an investment bank, a credit, financing and investment company (*'sociedade de crédito, financiamento e investimento'*, in Portuguese) or a securities broker-dealer company, all necessarily domiciled in Brazil, and, in the case of FIIs, a commercial bank, a multiple bank, an investment bank, a real estate credit company (*'sociedade de crédito imobiliário'*, in Portuguese), savings and loans institutions controlled by the Government, a securities broker-dealer company or a mortgage company (*'companhia hipotecária'*, in Portuguese), all necessarily domiciled in Brazil.

Agribusiness, real estate and financial receivables securitisation can also be conducted by limited liability corporations whose purposes are to purchase and securitise such receivables. Such entities shall be registered with the CVM if their shares or debt instruments are to be publicly traded. As with any Brazilian corporation, they must have management resident in Brazil. The most common debt instrument issued by the real estate securitisation companies are the 'certificates of real estate receivables' (*'certificados de recebíveis imobiliários'* or 'CRIs'), and for agribusiness receivables are the 'certificates of agribusiness receivables' (*'certificados de recebíveis do agronegócio'* or 'CRA'). In addition, it is worth mentioning that income paid under a CRI and a CRA to a natural person who subscribed or acquired such CRI or CRA is exempt from taxation.

There is no restriction on the status of the shareholders of these corporations nor in relation to investors in FIIs. As to FIDCs, investments are open only to qualified investors. Article 109 of CVM Instruction No. 409, dated 8 August 2004, provides that the following persons and entities may be classified as qualified investors: (i) financial institutions; (ii) insurance companies; (iii) pension funds; (iv) natural persons or legal entities with financial investments greater than R\$300,000.00 (approximately US\$166,000.00) who declare in writing their condition of qualified investor; (v) investment funds directed exclusively to qualified investors; and (vi) managers of portfolios and consultants in

securities previously authorised by the CVM in relation to their own assets.

7.3 Non-Recourse Clause. Will a court in Brazil give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

Yes, a court in Brazil will give effect to a contractual provision limiting the recourse of parties to available funds. However, a court in Brazil may 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 Brazil give effect to a contractual provision (even if the contract'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?

No. According to Article 5, XXXV of 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 fundamental (i.e., non-disposable) right constitutionally granted, therefore it will certainly prevail against the non-petition clause, even if such clause is grandfathered by a foreign law governing the relevant agreement.

7.5 Independent Director. Will a court in Brazil give effect to a contractual provision (even if the contract'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?

Yes, a Brazilian court might give effect to a contractual provision 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. However, this would be moderated by the Brazilian court's tendency to apply a reliance doctrine pursuant to which innocent third parties are not obliged to have knowledge of and abide by restrictions as to representation in a company's or similar entity's constitutive documents. The final outcome would depend on matters of fact and equitable considerations surrounding the case.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in Brazil, 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 Brazil? Does the answer to the preceding question change if the purchaser does business with other sellers in Brazil?

The purchaser of receivables is not required to qualify to do business 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?

The seller will be able to collect and enforce the receivables (including on behalf of the purchaser or any third party, such as a replacement servicer) without any need of a licence or consent until the obligor is notified about the sale of the receivable. Should collection and enforcement be initiated after the notice is served upon the obligor, written proof that the seller is empowered to act on behalf of the purchaser will be necessary.

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 Brazil 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 Brazilian banking laws and regulations to the extent that the purchaser is professionally engaged in factoring or similar credit purchase activities, and by the general rules protecting intimacy and private life contained in Article 5, X of the Brazilian Constitution. Such rules are not normally construed as restricting the use of obligor information, but only its unauthorised dissemination. Please note that, in general, it is lawful to send to credit protection agencies information on non-performing contracts or loans. The publication of information on non-compliant obligors, on the other hand, would violate 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 Brazil? Briefly, what is required?

Not in general, provided: (i) the purchaser acquired only the receivables (as opposed to being assigned the receivables contract, as a whole); and (ii) the receivables contract does not infringe any law. However, some specific rules to the protection of consumers may indeed apply to credit purchasers, the most conspicuous being the rule that prepayment is always possible at the initiative of the debtor, against proportional reduction of interest.

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

Currently, there are some restrictions in relation to payments made abroad, but they do not impede securitisation transactions. The Brazilian regulation of foreign currency exchange was redrafted in 2005 and several restrictions that existed were repealed. As a result, there are presently no important restrictions on the exchange of Brazilian currency or on payments using Brazilian currency to foreigners. In practical terms, however, the unavailability of

accounts in Brazilian currency outside the country will render infeasible the latter operations described in this question 8.5.

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 Brazil? 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?

Payments on receivables can be subject to withholding taxes in Brazil, depending on the nature of the payments and the condition/residence of the purchaser and the seller. The most common securitisation structure, however, which involves only companies domiciled in Brazil and real estate credits, is usually not subject to withholding taxes.

Some rules regarding withholding taxes on payments under receivables are: (i) when the seller/purchaser is an individual and the obligor is a Brazilian legal entity, payments are usually subject to withholding income tax (WHT) at rates of up to 27.5%; (ii) in case the seller/purchaser is an entity located outside Brazil, payments made to them may be subject to WHT at rates of 15% or 25% (the latter rate being applicable if the beneficiary is located in a tax haven jurisdiction); and (iii) in the case the obligor and seller are Brazilian companies and the receivables derive from professional services, there may be a tax withholding of up to 6.15%. Other withholding taxes may be applicable to specific situations.

In view of the complexity of Brazilian withholding tax legislation, each transaction should be carefully analysed by a local tax expert.

9.2 Seller Tax Accounting. Does Brazil 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, especially after the process of harmonisation of the Brazilian accounting rules with International Financial Reporting Standards (IFRS), the transaction's economic essence is required to prevail over its legal form for accounting purposes. In general, the seller registers the transaction as a sale of assets at a loss (discount), whereas the purchaser registers the purchase of the asset and the respective gain is recognised along the term of the securitisation.

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

There are no documentary taxes on the sale of receivables. Notwithstanding, 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 Brazil 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 receivables are not subject to value added tax, sales tax or

other similar taxes on sales of goods or services.

Fees received from a Brazilian party by a renderer of collection services resident in Brazil shall be subject to a service tax (ISS), which is charged from the service renderer at a tax rate between 2% and 5%, depending on the municipality where the services are rendered/performed. In certain cases the contracting party (purchaser) may be liable for withholding and collecting the ISS. This service tax is not due on services exported to non-Brazilian residents, as long as the services' results are verified out of Brazil.

In case the collection agent is an individual resident in Brazil, fees received from the purchaser (if a Brazilian legal entity) would be subject to WHT at rates of up to 27.5%. The purchaser 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 between 2% and 5%, depending on the municipality where the purchaser is located, (ii) WHT at a rate of 25%, and (iii) social contributions on gross revenues (PIS and COFINS) levied at a combined rate of 9.25%. Due to the form of calculating these taxes, the total effective tax burden can vary between 41% to 58% approximately, depending on whether the burdens of WHT and ISS are transferred to the Brazilian purchaser. The purchaser would be liable for the collection of these taxes.

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?

No, tax authorities cannot charge the purchaser for any taxes 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 by tax authorities as a fraud against creditors.

9.6 Doing Business. Assuming that the purchaser conducts no other business in Brazil, 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 Brazil?

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, therefore subjecting the foreign entity's income to Brazilian corporate taxation. In view of this, the maintenance of an agent or representative in Brazil which purchases receivables contractually binding the foreign entity can 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).

The engagement of seller to render collection services will only result in tax liabilities for the purchaser in Brazil in the situations described in our answer to question 9.4 above.

Apart from this, the ownership of the credits may trigger the taxation indicated in our answer to question 9.1 above.

Finally, if the purchaser issues securities or debt instruments to fund the purchase of the receivables, payments made by the purchaser to investors under such instruments may also be subject to WHT, the rates of which usually depend on the nature and term of the instrument. As the paying source, the purchaser would be liable for withholding and collecting such tax.



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