BRAZIL

Investment rules of the world

About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

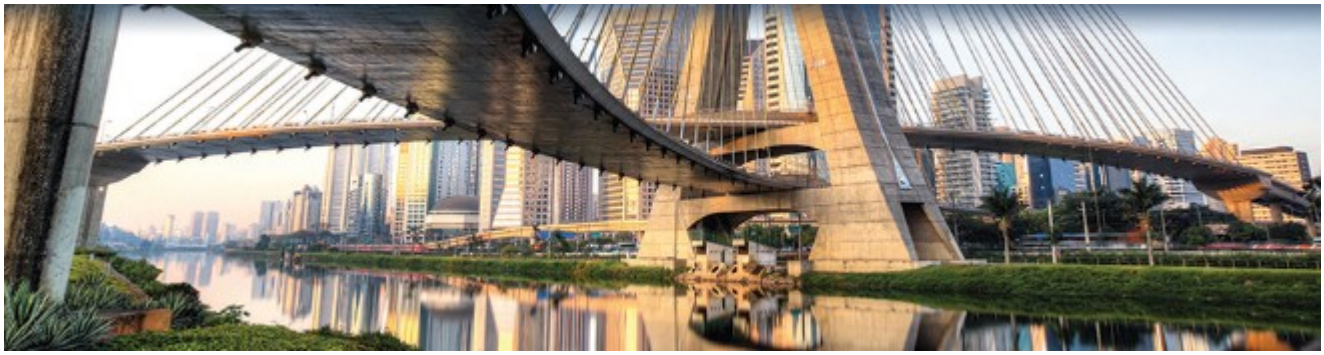
When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please contact us if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via investmentrules@dlapiper.com.



Brazil

Last modified 04 December 2019

Capital markets and structured investments

Issuing and investing in debt securities

Are there any restrictions on issuing debt securities?

There are restrictions on offering and selling debt securities under Brazilian law, in general, and Brazilian Securities Commission (CVM) regulation, specifically.

Unless certain exclusions or exemptions apply, it is unlawful to offer debt securities to the public in Brazil or to request that they are admitted to trading on a regulated market operating in Brazil unless:

- an approved prospectus has been made available to the public; and
- the offer is registered with CVM.

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What are common issuing methods and types of debt securities?

The most common types of debt securities issued in Brazil are shares and debentures. Shares may be voting *(ordinárias)* or non-voting (*preferenciais*). Debentures may be unsecured, secured, benefiting from a floating charge or subordinated. They may also be convertible into shares.

Many different types of debt securities are offered in Brazil. Some common forms include:

- commercial papers and promissory notes, which are short term securities;
- credit bank notes (*cédulas de crédito bancário*), which represent loans from banks and may be secured or unsecured;
- quotas of investment funds;
- derivative instruments such as securities linked to the value of one or more reference assets including shares, commodities, interest rate, currency rate or index, and credit-linked notes;
- depositary receipts (a security issued by a depositary conferring on the holders beneficial ownership of certain underlying assets held by the depositary for the holders); and
- warrants (*bônus de subscrição*), which are securities giving the holders the option to purchase the equity of the issuer or a related company.

There is also a number of types of securities in Brazil used to finance certain industries, in particular agribusiness and housing finance.

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What are the differences between offering debt securities to institutional / professional or other investors?

Institutional/professional investors benefit from an exemption from registration of a public offer with the Brazilian Securities Commission (CVM). On January 16, 2009, CVM enacted Instruction No. 476 which establishes that a public offering of certain securities will no longer be subject to registration with CVM or have to comply with CVM provisions relating to public offerings of securities, as established by Instruction No. 400, dated as of December 29, 2003 if they comply with the following requirements:

- involve one of the securities mentioned in Instruction No. 476, including, but not limited to: commercial notes, banking credit certificates that are not the responsibility of a financial institution, debentures not convertible or not exchangeable into shares, real estate or agribusiness rights certificates issued by securitization companies registered with the CVM as publicly-held companies, quotas of close-ended investment funds and financial notes (*letras financeiras*);
- be only targeted to qualified investors (as defined in the applicable regulation of CVM);
- be intermediated by members of the securities distribution system;
- be marketed to a maximum of 75 qualified investors and subscribed or acquired by no more than 50 qualified investors; and
- not involve marketing efforts through stores, offices and establishments open to the public or public communication services.

Public offers to any other type/number of investors are not covered by that exemption and have to comply with the applicable requirements of CVM.

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When is it necessary to prepare a prospectus?

Unless an exemption applies, a prospectus is necessary when there is a public offer of securities.

The sale, the sale commitment, the sale or subscription offer and the acceptance of a sale or subscription offer of securities shall be considered public distribution acts if involving any of the following elements:

- the use of sales or subscription lists or bulletins, leaflets, prospectus or advertisements addressed to the public by any means;
- the complete or partial search for undetermined subscribers or purchasers, even if attempted through standard communications directed to individually identified addressees, through employees, representatives, agents, or any individual or legal entity, whether they take part in the securities distribution system or not, or the consultation on the offer feasibility or the collection of an investment commitment with subscribers or undetermined purchasers if said consultation or collection is not in compliance with the applicable Brazilian Securities Commission (CVM) regulation;
- negotiations made in stores, offices or branches open to the public and addressed, in whole or in part, to undetermined subscribers or purchasers; or
- the use of oral or written marketing, letters, advertisements or notices, especially through mass or electronic media (pages or documents on the internet or other open computer networks and e-mail), which contain any communication addressed to the general public aiming at promoting, directly or through third parties acting on behalf of the offer or of the issuer, the subscription or disposal of securities.

For such purposes, a class, category, or group of people, even if individualized, with the exception of those who have had a close and regular previous commercial, credit, partnership or work relationship with the issuer, shall also be considered general public.

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What are the main exchanges available?

The main exchanges are the São Paulo Futures and Stock Exchange (B3 - Brasil Bolsa Balcão S.A.).

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Is there a private placement market?

Private placements are possible under Brazilian law, but, except for derivative transactions, there is no organized private placement market in the country.

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Are there any other notable risks or issues around issuing or investing in debt securities?

Issuing debt securities

Issuers and, to a certain extent, brokers, are required to take responsibility for prospectuses for debt securities. Misleading statements in, or omissions from, any applicable offering document can give rise to both civil and criminal liability under Brazilian law. Brazil has various investor protection statutory provisions relevant to liability for an inaccurate offering memorandum. There are also general fraud statutes and liability may also arise under common law through a civil action for deceit, negligent misstatement or misrepresentation.

Investing in debt securities

There are a number of considerations that the investor has to bear in mind before investing debt securities. For instance, debt security terms and conditions typically contain provisions for meetings of investors to consider matters affecting the investors' interests. These provisions typically permit defined majorities to bind all investors including investors who did not attend and vote at the relevant meeting and investors who voted against the majority.

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Establishing and investing in debt / hedge funds

Are there any restrictions on establishing a fund?

Establishing a fund, offering fund securities and operating a fund, among other things, are regulated activities and therefore subject to regulation by the Brazilian Securities Commission (CVM). According to Law No. 10,303 of 31 October 2001 the regulation and supervision of financial and investment funds (originally regulated and supervised by the Central Bank) were transferred to CVM.

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What are common fund structures?

Under Brazilian law, funds are considered to be as an ownership right shared by more than one person or legal entity (referred to under Brazilian law as *condominiums*), with no legal personality. Usually, they are established either as open ended *condominiums* (in which an investor may require the amortization of its quotas at any time, as provided for the in the rules of the fund) or closed ended funds (in which the quotas are only amortized by the end of the life of the fund).

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What are the differences between offering fund securities to professional / institutional or other investors?

Retail funds

The distribution of securities representing an interest in the capital of open-ended funds (referred to under Brazilian law as quotas) does not require advance registration with the Brazilian Securities Commission (CVM). However, the public distribution of quotas of closed-ended funds do require advance registration with CVM and must comply with all of the formalities applicable to the public offer of securities in Brazil.

Institutional/professional funds

The offer of quotas of closed-ended funds directed only to professional investors are automatically granted by CVM, provided certain documents are delivered to CVM through its internal internet system. The distribution of quotas of closed-ended funds to professional investors with limited marketing efforts also benefit from the registration exemption set out in CVM Instruction No. 476, provided the following additional requirements are complied with:

- quotas are marketed to a maximum of 75 qualified investors and subscribed or acquired by no more than 50 qualified investors; and
- no marketing efforts through stores, offices, establishments open to the public or public communication services are used.

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Are there any other notable risks or issues around establishing and investing in funds?

Establishing funds

In order for a fund to be established in Brazil it has to comply with the applicable rules of and be registered with the Brazilian Securities Commission (CVM). In accordance with the applicable regulation, the fund must have a manager and an independent accounting firm. The manager must be a Brazilian entity authorized by CVM for the performance of professional management of securities portfolios, in accordance with Article 23 of Law No. 6.385.

Investing in funds

Prospectuses for funds that are offered to the public in general must specify risk factors applicable to that type of investment.

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Managing and marketing debt / hedge funds

Are there any restrictions on marketing a fund?

The distribution of quotas of funds (both open-ended or closed-ended) may only be done by entities authorized to operate in the securities distribution system in Brazil (eg brokers or investment banks).

The distribution of quotas of open-ended funds does not require advance registration with the Brazilian Securities Commission (CVM). However, the public distribution of quotas of closed-ended funds do require the previous registration with CVM and must comply with all the formalities applicable to public offer of securities in Brazil.

In any event, marketing materials of any type of funds in Brazil have to follow the applicable regulation of CVM, in particular Instruction No. 555.

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Are there any restrictions on managing a fund?

The management of a fund is defined as the group of services directly or indirectly related to the functioning and maintenance of the fund. Those services may all be rendered directly by the manager of the fund or by third parties hired by the manager on behalf of the fund.

The manager is a legal entity duly authorized by the Brazilian Securities Commission (CVM) to provide securities portfolio management services, in accordance with Article 23 of Law No. 6.385 and other related regulations.

The manager may hire, on behalf of the fund, third parties duly authorized to render the following services to the fund (among others):

- portfolio managers;
- investment advisors;
- treasury services to manage the accounting for and control of financial assets;
- distribution of quotas;
- custody of financial assets;
- rating agencies; and
- market makers.

The management of the portfolio may be done by individuals or legal entities duly registered with CVM as professional portfolio managers.

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Entering into derivatives contracts

Are there any restrictions on entering into derivatives contracts?

Derivatives may be traded over-the-counter or on an organized exchange.

Multiple banks, commercial banks, investment banks, foreign exchange banks, broker dealers and securities dealerships are allowed to enter into swap, option, and future transactions in the Brazilian over-the-counter market on their own behalf and on behalf of their clients. Other financial institutions are only allowed to enter into this type of transaction on their own behalf. Those transactions have to be registered with an authorized clearing system in Brazil.

The Central Bank regulates the parameters for the calculation of the underlying indexes and prices for those transactions.

Brazilian companies may only enter into derivatives transactions in the international market for hedging purposes in connection with commercial or financial transactions which are subject to fluctuations in the international market of interest rates, foreign exchange or commodities prices. Those transactions have to be registered with a clearing system in Brazil.

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What are common types of derivatives?

Derivative contracts are entered into in Brazil for a range of reasons including hedging, trading and speculation.

All of the main types of derivative contract are widely used in Brazil:

- forwards;
- futures;
- swaps (such as interest rate or currency swaps); and
- options (call options and put options).

The value of the derivative contracts is based on the value of the underlying assets. The main classes of underlying assets seen in Brazil are:

- equity;

- interest rates;
- commodities;
- currencies; and
- credit.

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Are there any other notable risks or issues around entering into derivatives contracts?

Netting arrangements have to be expressly agreed by the parties of any given transaction to be valid. This arrangement has to be documented in a specific agreement, either through a public or a private instrument. Alternatively, the financial institutions may have a global netting agreement with the client, covering all derivatives transactions entered into by then.

Those agreements have to be registered either with the Registry of Deeds and Documents or an authorized clearing system in Brazil within 15 days of their execution. The agreements must set out the conditions for an event of default to occur and the methodology for the calculation, set-off and liquidation of the transactions.

Although the new Brazilian Bankruptcy Law (Law No. 11.101 dated 9 February 2005) has brought additional protections for netting arrangements, there are still a number of risks involved in the exercise of netting in a bankruptcy situation.

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Debt finance

Lending and borrowing

Are there any restrictions on lending and borrowing?

Lending

Pursuant to the applicable regulation, financial institutions are prohibited to carry out credit operations with related parties, except in some limited circumstances. For this purpose, the law defines as a financial institution's related party the following:

- its controlling shareholders, directors and members of other statutory bodies (fiscal, advisory and others) and their respective spouses and relatives up to second degree;
- individuals or legal entities that hold a qualified interest (as per current regulations) in their capital;
- legal entities in which they have qualified interest (direct or indirect);
- legal entities in which they have effective operational control or preponderance in the deliberations, regardless of the equity interest; and
- legal entities with common directors or members of the board of directors.

The restrictions with respect to transactions with related parties do not apply to: (i) transactions carried out under conditions compatible with the common market (including, but not limited to, in respect of limits, interest rates, grace periods, guarantee requirements and risk classification criteria), which shall be similar to those conditions that the financial institution adopts in transactions with unrelated parties; (ii) arms-length transactions with entities controlled by the Union, (iii) credit operations whose counterparty is a financial institution that is part of the same prudential conglomerate, provided that they contain a subordination clause; (iv) certain interbank deposits; (v) setoff obligations; and (vi) other situations authorized by the CVM.

Moreover, there are currently certain restrictions imposed on financial institutions limiting the extension of credit to public sector entities, such as government subsidiaries and governmental agencies. These are in addition to certain limits on indebtedness to which these public-sector entities are already subject.

Borrowing

Borrowers are generally not regulated. Borrowers under consumer and housing financing usually benefit from the protection of the Brazilian Consumer Defense Code and other relevant regulations from the Central Bank.

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What are common lending structures?

Lending in Brazil can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents and trustees which fulfil certain roles for the finance parties), are more highly structured and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicate taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, project facilities and letter of credit facilities.

Loan durations

The duration of a loan can vary between:

- a term loan, provided for an agreed final period of time;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

Loan security

A loan can either be secured, unsecured or guaranteed. For more information, see Giving and taking guarantees and security.

Loan commitment

A loan can be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan.

Loan repayment

A loan can be repayable on demand, on an amortizing basis (in instalments over the life of the loan) or scheduled (usually meaning the loan is repayable in full at maturity).

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What are the differences between lending to institutional / professional or other borrowers?

Lending to institutional/professional borrowers is subject to less regulatory oversight and so less burdensome from a compliance perspective.

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Do the laws recognize the principles of agency and trusts?

Brazilian law does not recognize the concept of a trust. Although not specifically regulated, agency is not a prohibited activity in Brazil and may be structured through other Brazilian law instruments, such as the combination of a power-of-attorney and a service agreement.

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Are there any other notable risks or issues around lending?

Generally

Loan agreements and other finance documents are subject to general contractual law regulation (set out in the Brazilian Civil Code). For example, Article 192 of the Brazilian Constitution, enacted in 1988, established a 12% per year ceiling on bank loan interest rates. However, since the enactment of the Constitution, this rate had not been enforced, as the regulation regarding the ceiling was pending. Several attempts have been made to regulate the limitation on bank loan interest, but none of the proposals has been implemented. On 29 May 2003, Constitutional Amendment No. 40 (EC 40/03) was enacted and revoked all subsections and paragraphs of Article 192 of the Brazilian constitution. This amendment allowed the Brazilian financial system to be regulated by specific laws for each sector of the system rather than by a single law relating to the system as a whole. With the enactment of the new Brazilian Civil Code (or Law No. 10,406 of 10 January 2002), unless the parties to a loan have agreed to use a different rate, in principle the interest rate ceiling has been pegged to the base rate charged by the National Treasury Office *(Tesouro Nacional)*. However, there is presently some uncertainty as to whether the target rate set by Special Clearance and Escrow System (*Sistema Especial de Liquidação e Custodia*, or SELIC) or the 12% per annum interest rate established in the Brazilian tax code should apply.

The impact of EC 40/03 and the provisions of the new Civil Code are uncertain at this time but any substantial increase or decrease in the interest rate ceiling could have a material effect on the financial condition, results of operations or prospects of Brazilian financial institutions.

Consumer loans are also generally subject to the restrictions of the Consumer Defense Code and certain other related regulation from the Central Bank. In 1990, the Brazilian Consumer Defense Code was enacted to establish rigid rules to govern the relationship between product and service providers and consumers and to protect final consumers. In June 2006, the Brazilian Supreme Court of Justice ruled that the Brazilian Consumer Defense Code also applies to transactions between financial institutions and their clients. Financial institutions are also subject to specific regulation of the National Monetary Council (CMN), regulating the relationship between financial institutions and their clients. CMN Resolution No. 3,694 dated 26 March 2009, as amended, established new procedures with respect to the settlement of financial transactions and to services provided by financial institutions to clients and the public in general, aiming at improving the relationship between market participants by fostering additional transparency, discipline, competition and reliability on the part of financial institutions. The new regulation consolidates all the previous related rules. The main changes introduced by the Consumer Defense Code are described below:

- Financial institutions must ensure that clients are fully aware of all contractual clauses, including responsibilities and penalties applicable to both parties, in order to protect the counterparties against abusive practices. All queries, consultations or complaints regarding agreements or the publicity of clauses must be promptly answered, and fees, commissions or any other forms of service or operational remuneration cannot be increased unless reasonably justified (in any event these cannot be higher than the limits established by the Central Bank);
- Financial institutions are prohibited from transferring funds from their clients' various accounts without prior authorization.
- Financial institutions cannot require that transactions linked to one another must be carried out by the same institution. If the transaction is dependent on another transaction, the client is free to enter into the latter with any financial institution it chooses.
- Financial institutions are prohibited from releasing misleading or abusive publicity or information about their contracts or services. Financial institutions are liable for any damage caused to their clients by their misrepresentations.
- Interest charges in connection with personal credit and consumer directed credit must be proportionally reduced in case of anticipated settlement of debts.
- Adequate treatment must be given to the elderly and physically disabled.

Specific types of lending

Payroll loans are a type of financial product under which the interest and repayment charges are deducted directly from employees' or retirees' pay checks. Since the repayment of payroll deduction loans is directly deducted from the salaries of public servants and private sector employees or from INSS (Brazilian Social Security System) retiree or pension benefits, in practice the credit risk is that of the entity to which borrowers are related. This feature enables banks to extend loans at rates lower than those charged in connection with other products offered by financial institutions in Brazil. This payment deduction mechanism is regulated by a number of laws and regulations, at the federal, state and municipal levels, which establish deduction limits and provide for the irrevocability of the authorization given by a public servant, private sector employee or INSS beneficiary to deduct the amount for purposes of settlement of the loan.

In addition, the extension of payroll deduction loans to public servants and social security service (INSS) retirees and pensioners depends on the authorization by public entities to which these persons are related.

If an employee's employment contract terminates, whether through termination by the employer, voluntary departure or death, repayments under the loan will depend mainly on the financial ability of the borrower or his/her successors to repay the loan. In certain instances, the borrower can offer their severance package as collateral. However, such security may not be able to cover the amount borrowed since there are some limitations on the amount to be offered as collateral. Similarly, if a private employer suffers losses or enters financial distress or bankruptcy, it may not be able to pay the salaries on which the payroll deductions depend. Any of these events could increase the risk in payroll loan portfolios and increase the need for measures to control default through restrictions on new loans, which may adversely affect a company's financial condition and results. Finally, under Brazilian law, if a borrower whose payments are deducted from his salary gets divorced or separated from his spouse, alimony payments may be directly deducted from his salary. These deductions may have priority over other liabilities (including over amounts owed to banks), thus potentially limiting a bank's ability to receive repayment.

Standard form documentation

The Brazilian market does not have standard form documentation for loans.

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Are there any other notable risks or issues around borrowing?

Borrowers should be aware of the potential implications of the laws dealing with failing financial institutions.

In case of bankruptcy or liquidation of a financial institution, certain credits, such as credits for salaries up to 150 minimum wages (*salários mínimos*) per labor creditor (ie a creditor deriving from labor relationships with the employees), among others, will have preference over any other credits.

The Brazilian market has a deposit insurance system (FGC) which guarantees a maximum amount of R$250,000 of deposits and credit instruments held by an individual against a financial institution (or against financial institutions of the same financial group) and a maximum amount of R$20 million of deposits for banks with deposits, up to R$5 billion per bank. The FGC is funded principally by mandatory contributions from all Brazilian financial institutions that work with client deposits. The payment of unsecured credit and client deposits not payable under the FGC is subject to the prior payment of all secured credits and other credits to which specific laws may grant special privileges.

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Giving and taking guarantees and security

Are there any restrictions on giving and taking guarantees and security?

Some of the key areas affecting the giving of guarantees and security are as follows.

General comments

The creation of a security interest (*in rem* guarantee) is a very formal procedure under Brazilian law. In order for it to be valid and enforceable in Brazil, the underlying obligation being guaranteed and, if such obligation is related to, or part of, a more complex transaction, the transaction as a whole must be considered legal, valid and binding under the relevant applicable laws. If the underlying obligation, the transaction generally or just elements of the transaction are not valid, the guarantee or security is also invalid. Additionally, the security agreement must comply with certain conditions (which are considered below) and the parties to it must perform all required formal acts.

The conditions that a transaction (*negócio jurídico* – a term which includes security documents) must comply with are set out in Article 104 of the Brazilian Civil Code. The conditions concern the capacity of the parties, the existence of an object of the transaction and the form of the documents).

Capacity of the parties

Capacity relates to the power and authority of a given party to enter into a transaction. The parties to the security agreement must be properly represented and duly authorized and empowered to enter into the transaction and create a security interest over certain assets. Capacity is determined by reference to matters such as restrictions under the constitutional documents of the entity entering into the security agreement.

Object

Brazilian law prevents parties from entering into agreements in which the object is not possible or considered to be illicit under Brazilian law. An example of something that is not possible would be an agreement by two private parties to sell an asset owned by the state. An illicit object could be, for example, the exploitation of a casino in Brazil.

Form and other requirements

Security agreements must follow a form established or not forbidden under Brazilian law in order to be capable of being enforced in Brazil. For example, Article 1,452 of the Brazilian Civil Code and Article 127 of the Public Registries Law require that a pledge of shares be constituted by means of a written agreement (private or public) duly registered in the competent Registry of Documents and Deeds in Brazil.

Furthermore, the security agreement must be drafted in order to comply with the other formal requirements of Brazilian law, such as including a detailed description of the assets being pledged and the main financial terms and conditions of the obligation being secured, including:

- the principal amount of the debt;
- the repayment dates; and
- the applicable interest rate.

Economic benefit

In addition to the formalities for the creation of a security interest, the economic benefit generated or a commercial justification for the granting of such security interest by a given issuer of a security interest will have to be analysed. Although this aspect would not generally affect the validity or enforceability of the security agreement, if there is no economic benefit for the guarantor there is a risk of claims being filed by interested third parties, such as minority shareholders or other creditors of the guarantor upon the bankruptcy of the guarantor, as explained below.

Minority shareholders

As a general rule, minority shareholders of an issuer of a security interest may challenge the execution of a security agreement on the basis that the relevant transaction was not entered into in the best interests of the company. Any claim to be brought by minority shareholders on this basis would most likely relate to the fact that there was an abuse of power by the controlling shareholder and/or that the managers carried out acts that conflicted with the company's best interests. The grounds supporting any such claim for damages placed by minority shareholders may be strengthened to the extent that the security interest is enforced.

Creditors' claims

Creditors of an issuer of a security interest may also challenge the execution of a security agreement if the transaction is not justifiable from an economic or commercial point of view. A Brazilian court will take into account the current credit strength (ie solvency) and the outstanding indebtedness of the guarantor when considering this issue.

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What are common types of guarantees and security?

Common forms of guarantees

Generally, there are two types of personal guarantees: surety (*fiança*) and the so-called 'aval'. Under a surety, an individual or a legal entity undertakes to perform/repay an obligation if the obligor fails to do so. Aval is a specific guarantee used to secure debt instruments. Personal guarantees are always formalized in writing.

Common forms of security

There is more than one type of *in rem* guarantee. The nature of the assets that support the guarantee affect which type of *in rem* guarantee is used. Under Brazilian law, assets can be divided into the following categories:

- movable assets, eg shares and equipment; and
- immovable assets, eg land and buildings.

Certain assets such as aircraft and ships, although considered to be movable assets, are subject to the requirements applicable to immovable assets (such as registration requirements).

The two most usual types of *in rem* guarantees are:

- pledge (*penhor*), which relates to movable assets and credit rights; and
- mortgage (*hipoteca*), which relates to immovable assets.

In the case of *in rem* guarantees, each asset given as security must be duly referred to in the relevant agreement.

The Brazilian Civil Code provides for another form of guarantee in respect of movable assets which are not fungible. This type of guarantee results in the ownership of the asset and the indirect possession of it being transferred to the creditor, while direct possession remains with the guarantor. The guarantor assumes the duties and liabilities of a bailee in relation to that asset.

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Are there any other notable risks or issues around giving and taking guarantees and security?

Upstream and cross-stream guarantees

Upstream and cross-stream guarantees are not prohibited by Brazilian law. Where a guarantee is given in respect of the obligations of a non-Brazilian holding company, certain foreign exchange restrictions may apply.

Financial assistance

Financial assistance (which under Brazilian law includes assistance by way of loans, guarantees, security or reduction of liability) is not specifically regulated by Brazilian law. However, depending on the legal status of the company (regulated entity, financial institution, publicly or privately held corporation, limited liability etc), and the relationship between the grantor and the beneficiary of the financial assistance, restrictions may apply.

For example, financial institutions are prohibited to carry out credit operations with related parties (as defined in specific regulation), except in some limited circumstances.

Additionally, if financial assistance involves a company located outside Brazil, certain foreign exchange rules will have to be observed.

It will be necessary to take advice on a case-by-case basis as to whether restrictions apply to a particular scenario.

Notarization and apostillation or consularization

If security agreements are signed by a party outside Brazil, it must be duly apostilled (*apostilado*) by the competent authority of the place the foreign judgement was issued or, in case the country in which the place the foreign judgement was issued is not a party to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of 5 October 1961, be legalized by a consular official of Brazil having jurisdiction over the place of issuance.

Translation into Portuguese

Only Portuguese language documents may be registered with Brazilian public registries. If the security agreements are not drafted in Portuguese, they must be translated into Portuguese by a certified translator and registered with the competent Brazilian Registry of Deeds and Documents or Real Estate Registry, as the case may be.

Registration

In other to be valid against third parties (and to ensure priority in a bankruptcy proceeding), the security agreements must be registered with the appropriate Brazilian public registries. The relevant register depends on the nature of the asset secured. For example, security over moveable assets other than planes, trains and ships is registrable at the appropriate Registry of Deeds and Documents in Brazil. Security over real estate should be registered at the appropriate Real Estate Registry. Other registrations may be required according to the type of asset that is secured. For example, security over shares in a Brazilian company would need to be registered in that company's share registry book.

Fees

The registries in Brazil will charge a fee to perform the registration of the security agreements or any amendments to them. The amount to be charged by the registries will depend on the:

- location in which the security agreement must be registered in (for instance, mortgages must be registered in the place where the real estate asset is located); and
- amount being secured.

There will also be the cost related to the translation of the security agreements into Portuguese, which will be charged by the certified translator based on the number of pages to be translated, as well as the cost related to the apostillation or consularization of the signatures.

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Financial regulation

Law and regulation

What are the main laws and regulations that apply to entities that are involved in finance and investments generally?

Generally

Law No. 4.595 (Brazlian Financial System Law) 31/12/1964
Law No. 10.406/2002 (Brazilian Civil Code - Código Civil) 10/01/2002

Consumer credit

Law No. 4.595 (Brazilian Financial System Law) 31/12/1964
Law No. 8.078 (Brazilian Consumer Defense Code – *Código de Defesa do Consumidor*) 11/09/1990

Mortgages

Law No. 9.514 (Brazilian Real Estate Financial System) 20/11/1997
Law No. 10.406/2002 (Brazilian Civil Code - Código Civil) 10/01/2002

Corporations

Law No. 6.404 (Brazilian Corporation Law – *Lei de Sociedades por Ações*) 15/12/1976

Funds and platforms

Brazilian Securities Commission (CVM - *Comissão de Valores Mobiliários*) Instruction No. 555 17/12/2014

Other key market legislation

Law No. 4.728 (Brazilian Stock Markets Law) 14/07/1965
Law No. 6.385 (Brazilian Securities Law) 07/12/1976

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Regulatory authorization

Who are the regulators?

The basic structure of the Brazilian financial system (*Sistema Financeiro Nacional*) was established by Law No. 4.595, which created the CMN (as defined below) and granted the Central Bank, among other things, the powers to issue money and control credit.

Main regulatory agencies

The Brazilian financial system consists of the following regulatory and fiscal bodies:

- the National Monetary Council (*Conselho Monetário Nacional* or CMN);
- the Central Bank of Brazil;
- the Brazilian Securities Commission (*Comissão de Valores Mobiliários* or CVM);
- the Superintendence of Private Insurance (*Superintendência de Seguros Privados* or SUSEP); and
- the Complementary Pensions Secretariat (*Superintendência Nacional de Previdência Complementar* - PREVIC).

The CMN and the Central Bank regulate the Brazilian banking sector. The CVM is responsible for the policies of the Brazilian securities market. Below is a summary of the main attributes and powers of each of these regulatory bodies.

The CMN

Currently, the CMN is the highest authority in the system and is responsible for Brazilian monetary and financial policy and for the overall formulation and supervision of monetary, credit, budgetary, fiscal and public debt policies. The CMN is responsible for:

- adjusting the volume of forms of payment to the needs of the Brazilian economy;
- regulating the domestic value of the currency;
- regulating the value of the currency abroad and the country's balance of payments;
- regulating the constitution and operation of financial institutions;

- directing the investment of the funds of financial institutions, public or private, taking into account different regions of the country and favorable conditions for the stable development of the national economy;
- supervising Brazil's reserves of gold and foreign exchange;
- enabling the improvement of the resources of financial institutions and instruments;
- monitoring the liquidity and solvency of financial institutions;
- coordinating monetary, credit, budgetary, fiscal and public debt policies; and
- establishing the policy used in the organization and operation of the Brazilian securities market.

The Central Bank

Law No. 4.595 granted the Central Bank powers to implement the monetary and credit policies established by the CMN, as well as to supervise public and private sector financial institutions and to apply the penalties provided for in law, when necessary. According to Law No. 4.595, the Central Bank is also responsible for, among other activities, controlling credit and foreign capital, receiving mandatory payments and voluntary demand deposits from financial institutions, carrying out rediscount operations and providing loans to banking institutions, in addition to functioning as the depositary for official gold and foreign currency reserves. The Central Bank is also responsible for controlling and approving the operations, the transfer of ownership and the corporate reorganization of financial institutions, as well as the establishment of transfers of principal places of business or branches (whether in Brazil or abroad) and requiring the submission of periodical and annual financial statements by financial institutions.

The President of the Central Bank is appointed by the President of Brazil, subject to ratification by the Federal Senate, and holds office for an indefinite period of time.

The CVM

The CVM is a government agency of the Ministry of Economy, with its headquarters in Rio de Janeiro and with jurisdiction over the whole Brazilian territory. The agency is responsible for implementing the securities policies of the CMN and is able to regulate, develop, control and supervise this market strictly in accordance with the Brazilian Corporate Law and securities laws.

The CVM is responsible for regulating the supervision and inspection of publicly-held companies (including with respect to disclosure criteria and penalties applicable to violations in the securities market), the trading and transactions in the securities and derivatives markets, the organization, functioning and operations of the stock exchanges and the commodities and futures exchanges and the custody of securities.

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What are the authorization requirements and process?

The Central Bank's approval process

The incorporation of a financial institution in Brazil requires the prior approval of the Central Bank.

On 2 August 2012, the National Monetary Council (CMN) enacted Resolution No. 4.122, which regulates, amongst other things, the requirements and procedures for the authorization for organization and operation of financial institutions and other types of financial institutions.

In general terms, the incorporation process must begin with a written request to be filed with the Central Bank containing a number of required documents. After the documentation mentioned is received by the Central Bank, it will summon the future controlling persons of the financial institution for a technical interview so that they can present their proposal. According to Resolution 4.122, the Central Bank may, at its sole discretion and on a case-by-case basis, waive the need for a technical interview, if it believes that the venture proposal is sufficiently explained in the executive summary and that the future controlling persons have demonstrated sufficient knowledge on the business field and in the sector that the financial institution intends to operate.

If the Central Bank does approve the transaction, the applicant will have to comply with several requirements imposed by Resolution No. 4,122 within a certain period of time. Once the Bank of Brazil considers that all the requirements have been properly met, it will be in

position to grant the necessary approval for the financial institution to operate in Brazil. The entire process may take from eight months to one year (or more) to be completed.

The regulator will also approve key individuals (eg senior management) in their roles.

Foreign banks

The Brazilian Constitution prohibits foreign financial institutions from establishing new branches or subsidiaries in Brazil, except when duly authorized by the Brazilian government (by means of a presidential decree). A foreign financial institution duly authorized to operate in Brazil through a branch or a subsidiary is subject to the same rules, regulations and requirements that are applicable to any Brazilian financial institution.

Foreign investment in Brazilian financial institutions

Notwithstanding the above, foreign investors may acquire publicly traded non-voting shares of Brazilian financial institutions negotiated on a stock exchange, or depositary receipts offered abroad representing non-voting shares without specific authorization. However, the acquisition by a foreign investor of voting shares of Brazilian financial institutions requires the authorization by the Brazilian government (by means of a presidential decree). In addition to that, the acquisition of a material interest or control of a financial institution (either by a foreign or local investor) requires the prior approval of the Central Bank.

Nevertheless, on September 26, 2019, the Presidency of the Republic issued Decree 10,029, empowering the Central Bank to authorize, among others, the increase of foreign equity interest into financial institutions authorized to operate in Brazil. In other words, a presidential decree authorizing investment in financial institutions is no longer necessary considering that the Central Bank has powers to recognize as of interest of the Brazilian government an increase in the percentage of equity in the capital of financial institutions headquartered in Brazil, held by individuals or legal entities resident or domiciled abroad.

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What are the main ongoing compliance requirements?

The activities carried out by financial institutions are subject to several limitations and restrictions. In general terms, such limitations and restrictions are related to granting credit, risk concentration, investments, conditional operations, loans in and trading with foreign currency, administration of third-party funds and microcredit finance and payroll deduction credit.

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What are the penalties for failure to be authorized?

Carrying out activities that are private of financial institutions and other entities authorized to operate by the Central Bank and the Brazilian Securities Commission (CVM) may subject the offender to criminal sanctions, in addition to civil and administrative penalties.

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Regulated activities

What finance and investment activities require authorization?

The main types of financial institution in Brazil are as follows.

Investment banks

Investment banks are financial institutions of a private nature specializing in:

- operations of temporary equity participation;
- financing production activities, providing fixed or working capital; and

- managing third parties' assets.

Investment banks are also allowed to:

- practice, on their own account or at the request of a third party, sale and purchase operations of (a) precious metal and (b) bonds and securities;
- operate, on their own account or under the request of a third party, in stock exchange and future exchange markets (under a specific authorization from the Brazilian Securities Commission (CVM));
- operate under all kinds of credit granting to finance fixed or working capital;
- participate in bonds and securities issuance, subscription to resale and distribution processes (under a specific authorization from CVM);
- operate in the foreign exchange market (under a specific authorization from the Central Bank);
- coordinate the reorganization of companies or group of companies by means of consulting services, acquisition of equity stake and/or financing; and
- manage companies, the corporate purposes of which are directly linked with financial market operations.

Commercial banks

Commercial banks are financial institutions, of private or public nature, specializing in:

- short- and medium-term financing for the supply of capital to individuals, commerce and industry;
- cashing of drafts;
- granting credit facility;
- collecting cash and time deposits;
- fund raising to perform on lending operations; and
- acting as service providers, including services provided through convention with other institutions.

Securities brokers (CTVM)

Securities brokers are financial institutions of a private nature specializing in:

- operating in stock exchanges;
- subscribing solely or jointly with other authorized companies to resale bonds and securities;
- intermediating public offers and distributing bonds and securities;
- purchasing and selling bonds and securities for themselves or for third parties, with due regard to the regulation issued by CVM and Central Bank;
- managing portfolios and the custody of bonds and securities;
- being responsible for the subscription, transfer and authenticity of:
  - endorsement;
  - split of portfolios;
  - receipt and payment of redemption proceeds; and
  - interest and other incomes related to bonds and securities;
- acting as trustee;
- incorporating, organizing and operating funds and investment clubs;

- incorporating investment companies – foreign capital and administration of their respective portfolios of bonds and securities;
- acting as issuer agents of certificates and share book entering services;
- issuing certificates of deposit for shares;
- intermediating foreign exchange transactions;
- purchasing and selling precious metal, for themselves or for third parties, according to Central Bank's regulation;
- operating in commodities and future exchange, for themselves or for third parties, according to Central Bank's and CVM's regulation;
- intermediating, advising and giving technical assistance to transactions and activities related to the capital and financial markets; and
- practicing other activities authorized by CVM and Central Bank.

Securities dealerships (DTVM)

Securities dealerships are financial institutions of a private nature specializing in:

- subscribing solely or jointly with other authorized companies to resale bonds and securities;
- intermediating public offers and distribution of bonds and securities;
- purchasing and selling bonds and securities for themselves or to third parties, with due regard to the regulation issued by CVM and Central Bank;
- managing portfolios and the custody of bonds and securities;
- being responsible for the subscription, transfer and the authenticity of
  - endorsements;
  - splits of portfolios;
  - receipt and payment of redemption proceeds; and
  - interest and other related to bonds and securities;
- acting as trustee;
- incorporating, organizing and operating funds and investments clubs;
- incorporating investment companies – foreign capital and administration of their respective portfolios of bonds and securities;
- acting as an issuer agent of certificates and share books entering service;
- intermediating foreign exchange transactions;
- purchasing and selling precious metals, for themselves or for third parties, according to Central Bank's and CVM's regulation;
- operating in the barter exchange for themselves or for third parties, according to Central Bank's and CVM's regulation;
- intermediating, advising and giving technical assistance to transactions and activities related to the capital and financial markets; and
- practicing other activities authorized by CVM and Central Bank.

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Are there any possible exemptions?

No.

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Do any exchange controls or other restrictions on payments apply?

Where loans (and certain other financial transactions) are entered into with Brazilian companies as borrowers, the main financial terms of the loan must be registered with the Central Bank under the Module of Registry of Financial Transaction (*Módulo de Registro de Operações Financeiras* – ROF) of the Central Bank Data System and the funds must be paid into Brazil. This registration with the Central Bank allows borrowers to make payments of principal, interest, cost, fees, expenses and commissions in relation to the loan.

Investments made by foreign residents in the Brazilian financial or capital markets have to be registered with the Central Bank in the 'Portfolio' Module of the Central Bank Data System once funds enter into Brazil. This registration allows foreign investors to repatriate the principal of the investment and any gain relating thereto.

Investments made by foreign residents in the capital of Brazilian companies outside the Brazilian financial or capital markets have to be registered with the Central Bank in the Module of Foreign Direct Investment (*Módulo de Investimento Estrangeiro Direto* – IED) of the Central Bank Data System once funds enter into Brazil. This registration allows foreign investors to repatriate the capital and receive payments of dividends and other related payments abroad.

Other payments involving remittances of funds abroad have to be carried out by institutions authorized by the Central Bank to operate in the foreign exchange market and are subject to certain controls.

There are no currency controls expressly applicable to the Brazilian real.

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What are the rules around financial promotions?

Rules

A communication of an invitation or inducement to engage in investment activity made by a person in the course of business may only be done by an entity authorized for such purpose by the Central Bank of Brazil or the Brazilian Securities Commission (CVM).

Exemptions

Brazilian securities legislation does not specifically regulate the offer, to Brazilian resident investors, of securities issued, placed, distributed and negotiated abroad (Foreign Securities). As a result of Brazilian legal restrictions as to the public offer of securities, Foreign Securities may not be offered/negotiated in the Brazilian capital markets. Foreign Securities may only be offered to investors resident in Brazil on a private basis, by means of individual/specific identification and assessment, as an opportunity for investment abroad, provided that the relevant private offer does not involve any kind of public communication services, any type of offices/premises open to the public in general or any brokers/dealers that indiscriminately contact investors.

On 30 September 2005 CVM enacted the Guidance Opinion No. 32 ("Opinion 32") aiming at, generally speaking, reporting its understanding on the qualification of an offer of securities as public when the Internet is adopted as a means of communication.

The Opinion 32 restates CVM's understanding that the use of the Internet to disclose an offer of securities qualifies, as a general rule, the offer as a public one. Some situations may, however, be taken into consideration so that the offer will not be regarded as public. Among them, Opinion 32 refers to the following: (a) the webpage is protected in order to avoid the access of the public in general to information contained therein; (b) the non-existence of advertising about the webpage to the public by any means of communication; and/or (c) existence of clear indication that the webpage was not created to the public in general.

On that same date, CVM further enacted the Guidance Opinion No. 33 ("Opinion 33") aiming at reporting its understanding on the:

- qualification of a securities offer as public when the issuer is located outside Brazil; and
- need of a registration at CVM of those agents that intend to mediate, in Brazil, transactions involving securities issued and negotiated outside Brazil to investors residing in Brazil.

According to Opinion 33, the mediation of securities issued and distributed abroad to Brazilian investors by entities incorporated and located abroad is only authorized – without the need of any registration or notification – on a private basis and provided that the:

- approach activities aiming at the Brazilian investors are carried out abroad; and
- operation is not characterized as a public offer.

If entities incorporated and located abroad intend to mediate securities issued and distributed abroad to Brazilian investors with regard to activities carried out in Brazil, they must:

- be registered with CVM; or
- contract a member of the so-called securities distribution system to perform the operation in Brazil.

If the offer qualifies as public, both the issuer and the issuance are subject to Brazilian registration rules.

Opinion 33 further clarifies that, for an offer of securities issued abroad not to qualify as addressed to the public residing in Brazil when made through the internet, the following situations, in addition to those provided for in Opinion 32, would be taken into consideration:

- the existence of a notice of clear content and easy access clarifying that the offer is addressed only to the countries where the information provider or the issuer is authorized to offer securities (listing the relevant countries);
- effective measures to prevent access by Brazilian investors;
- a direct or indirect indication (provided that it is sufficiently clear) that the webpage was not created for Brazilian investors (the disclosure of economic forecasts in Brazilian currency or the inclusion of Brazil among the listed countries on any form or, furthermore, the comparison between the issuer of securities and Brazilian issuers are all considered an indication that the page is also directed to investors residing in Brazil); and
- the non-existence, even in a language other than Portuguese, of text to target Brazilian investors.

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Entity establishment

What types of legal entity are generally used to undertake financial or investment activity?

Generally

In very broad terms there are two main types of legal entities in Brazil: the limited liability partnership (*limitada*) and the corporation (*sociedade anônima*), both of which are body corporates with separate legal personality and which limit the liability of their members. Corporations can be privately held or publicly held depending on whether their shares are offered to the public.

Usually, the type of legal entity used to incorporate a financial institution is regulated by the Central Bank of Brazil (eg commercial banks may only be incorporated as a corporation)

Funds

Under Brazilian law, funds are considered as an ownership right shared by more than one person or legal entity (referred to under Brazilian law as *condominiums*). There is a variety of different funds that are regulated by the Brazilian Securities Commission (CVM). The main difference between them is the type of investments they are allowed to make: for example, there are real estate funds, general investment funds, private equity funds and securitization funds among others.

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Is it possible to conduct lending or investment business through a branch or establishment?

Yes, with the approval of the Central Bank of Brazil and other approvals, as the case may be (eg the approval of the President in the case of foreign investment).

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FinTech

FinTech products and uses

What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?

Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Before the enactment of CMN Resolution No. 4,656 and CMN Resolution No. 4,657, both dated as of April 26, 2018, which regulated the activities of financial technology companies that operate in the credit market, a financial institution duly authorized by the Central Bank of Brazil was required to mediate the transactions between lenders and borrowers, while the non-bank lending platform only acted as a corresponding agency of the bank. However, with the enactment of the above-mentioned resolutions, these startups were allowed to grant credit without the intermediation of a bank. These regulations came to create a healthier framework for the development and strengthening of FinTechs in Brazil. In addition, by regulating this kind of activity, the Central Bank hopes to encourage competition within this sector and, consequently, offer more competitive interest rates.

Also, as per the approved regulation, FinTechs could be structures as **(i)** Direct Credit Companies, which will carry out operations with their own resources through an electronic platform; or **(ii)** Interpersonal Loans Company, focused on financial intermediation (peer-to-peer). Furthermore, on October 29, 2018, the Federal Government enacted Decree No. 9,544, authorizing the foreign investment up to 100% in the capital stock of Direct Credit Companies or Interpersonal Loans Company.

Blockchain, smart contracts and cryptocurrencies

WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called "hashes".

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the block using sophisticated algorithms and add the verified block to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third-party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that, once authorized can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced more-complex interactions with the outside world using so called 'Oracles'. With Oracles the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate, depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

WHAT IS A CRYPTOCURRENCY?

Brazilian Law No. 12,865/2013 defines cryptocurrency as the value stored in electronic devices or systems that allowed the user to make a payment in a transaction. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

Initial coin offerings and token-based products

Initial coin offerings (ICOs) are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture. ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security, or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice

tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

On April 26, 2018, the CMN enacted CMN Resolution No. 4,658, as amended, which provided for the obligation of financial institutions and other institutions authorized to function by the Central Bank, including Credit FinTechs, to implement cyber security policies and established requirements to hire data, computing processing and storage services in the so-called "clouds".

This Resolution became effective on the date of its publication and financial institutions and other institutions authorized to function by the Central Bank, including Credit FinTechs, had a deadline of May 6, 2019 to implement the new security, course of action and prevention policies for incidents related to cyber environment.

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Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?

General financial regulatory regime

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MAIN REGULATORY AGENCIES

The Brazilian financial system (*Sistema Financeiro Nacional*) consists, among others, of the following regulatory and fiscal bodies:

- National Monetary Council (*Conselho Monetário Nacional* or CMN);
- Central Bank of Brazil;
- Brazilian Securities Commission (*Comissão de Valores Mobiliários* or CVM);
- Brazilian Council of Private Insurance (Conselho Nacional de Seguros Privados – CNSP);
- Superintendence of Private Insurance (*Superintendência de Seguros Privados* or SUSEP); and
- Complementary Pensions Secretariat (*Superintendência Nacional de Previdência* - PREVIC).

The CMN and the Central Bank regulate the Brazilian banking sector. The CVM is responsible for the policies of the Brazilian securities market. Below is a summary of the main attributes and powers of each of these regulatory bodies.

THE CMN

Currently, the CMN is the highest authority in the system and is responsible for Brazilian monetary and financial policy and for the overall formulation and supervision of monetary, credit, budgetary, fiscal and public debt policies.

THE CENTRAL BANK

Law No. 4,595 granted the Central Bank powers to implement the monetary and credit policies established by the CMN, as well as to supervise public and private sector financial institutions and to apply the penalties provided for in law, when necessary. According to Law No. 4,595, the Central Bank is also responsible for, among other activities:

- controlling credit and foreign capital;

- receiving mandatory payments and voluntary demand deposits from financial institutions;
- carrying out rediscount operations and providing loans to banking institutions;
- functioning as the depositary for official gold and foreign currency reserves;
- controlling and approving the operations, the transfer of ownership and the corporate reorganization of financial institutions;
- the establishment of transfers of principal places of business or branches (whether in Brazil or abroad); and
- requiring the submission of periodical and annual financial statements by financial institutions.

The President of the Central Bank is appointed by the President of Brazil, subject to ratification by the Federal Senate, and holds office for an indefinite period of time.

THE CVM

The CVM is a government agency of the Ministry of Economy, with its headquarters in Rio de Janeiro and with jurisdiction over the whole Brazilian territory. The agency is responsible for implementing the securities policies of the CMN and is able to regulate, develop, control and supervise this market strictly in accordance with the Brazilian Corporate Law and securities laws.

The CVM is responsible for regulating the supervision and inspection of publicly-held companies (including with respect to disclosure criteria and penalties applicable to violations in the securities market), the trading and transactions in the securities and derivatives markets, the organization, functioning and operations of the stock exchanges and the commodities and futures exchanges and the custody of securities.

Electronic payments platforms and regulation of peer-to-peer lenders

ELECTRONIC PAYMENT PLATFORMS

Law No. 12,865/2013 regulates the payment schemes and payment institutions, which have become part of the Brazilian Payments System. A number of FinTech businesses are offering electronic payment platforms to rival the traditional payment systems.

PEER-TO-PEER LENDERS

The CMN approved on April 26, 2018, resolutions No. 4,656 and 4,657, regulating the activities of financial technology companies that operate in the credit market and enabled these companies, which used to operate as banking correspondents in the credit market, to grant credit without the intermediation of a bank. The new rules applied immediately to these entities and allowed interested companies to start the authorization process.

As per the approved regulation, FinTechs could be structures as **(i)** Direct Credit Companies, which will carry out operations with their own resources through an electronic platform; or **(ii)** Interpersonal Loans Company, focused on financial intermediation (peer-to-peer). Furthermore, on October 29, 2018, the Federal Government enacted Decree No. 9,544, authorizing the foreign investment up to 100% in the capital stock of Direct Credit Companies or Interpersonal Loans Company.

Regulation of payment services

GENERAL OVERVIEW

A payment institution in Brazil is a legal person subject to the Central Bank's provisions, adhering to one or more payment schemes, having as main or ancillary activity one or more of the following (a Payment Institution):

- providing cash-in and cash-out services of the funds held on payment accounts;
- performing or facilitating payment instructions related to definite payment service, including transfers originated from or intended for a payment account;
- managing payment accounts;
- issuing payment instruments;

- acquiring payment instruments;
- remit funds;
- converting physical or book-entry currency into e-money, or vice-versa, acquiring the acceptance or managing the use of e-money; and
- other activities related to payment services, designated by the Central Bank.

LEGAL FRAMEWORK

Payment Institutions in Brazil are subject, primarily, to the following laws and regulations:

- Law No. 12,865/2013, as amended, regulates the payment schemes and payment institutions, which have become part of the Brazilian Payments System (SPB);
- Resolution No. 4,282/2013 presents a guideline for the regulation of the Central Bank regarding payment schemes and payment institutions;
- Central Bank Circular No. 3,680/2013, as amended, regulates payment accounts;
- Central Bank Circular No. 3,681/2013, as amended, regulates the risk management, minimum capital requirements and governance of payment institutions, among others;
- Central Bank Circular No. 3,682/2013, as amended, regulates payment schemes within the SPB;
- Central Bank Circular No. 3,885/2018, as amended, regulates payment institutions;
- Central Bank Circular No. 3,856/2017 provides for the internal audit activity in the institutions of payment;
- Central Bank Circular No. 3,704/2014 regulates the account held at the Central Bank regarding e-money and the performance of the payment institutions and transfer of reserves system (Sistema de Transferência de Reservas – STR);
- Central Bank Circular Letter No. 3,949/2019 provides clarifications and models regarding the procedures to request authorization for payment schemes;
- Central Bank Circular Letter No. 3,897/2018 provides models of necessary documents to support the proceedings addressed in Central Bank Circular No. 3,885/2018;

CATEGORIES

Under Article 4 of Circular No. 3,855, payment institutions are classified in the following categories, according to the services that will be rendered:

CATEGORY	SERVICES RENDERED
Issuer of e-money	• Manages pre-paid payments account of final users • Provides e-money payment transactions • Accredits the acceptance of e-money with settlement in payment account managed by the issuer • Converts the resources into physical and scriptural currencies, or *vice versa*
Issuer of post-paid payment instrument	• Manages post-paid payment account of final payer users • Provides payment transactions

Accrediting entity	• Does not provide payment account • Enables recipients to accept payment instruments issued by a payment institution or financial institution member of a same payment scheme • Participated in settlement procedures of the payment transaction as creditor in front of the issuer

OPERATIONS

According to Circular No. 3,855, the essential conditions for a Payment Institution to operate are:

- due incorporation according to the current rules and regulations;
- Central Bank authorization (only for payment institutions that operate with a volume greater than R$500 million in payment transactions or R$50 million in funds held in prepaid payment account for any given period of 12 months); and
- compliance with the minimum capital requirements in case the payment institution is authorized by the Central Bank.

Application of data protection and consumer laws

BRAZILIAN CONSUMER DEFENSE CODE

Financial activities are also generally subject to the restrictions of the Consumer Defense Code and certain other related regulations from the Central Bank. In 1990, the Brazilian Consumer Defense Code was enacted to establish rigid rules to govern the relationship between product and service providers and consumers with the overall aim to protect final consumers. In June 2006, the Brazilian Supreme Court of Justice ruled that the Brazilian Consumer Defense Code also applies to transactions between financial institutions and their clients. Financial institutions are also subject to specific regulation from the National Monetary Council (CMN), which regulates the relationship between financial institutions and their clients. CMN Resolution No. 3,694 dated March 26, 2009, as amended by CMN Resolution No. 3,919 dated November 25, 2010 and CMN Resolution No. 4,283 dated November 4, 2013, established new procedures with respect to the settlement of financial transactions and to services provided by financial institutions to clients and the public in general, aimed at improving the relationship between market participants by fostering additional transparency, discipline, competition and reliability on the part of financial institutions. The new regulation consolidates all the previous related rules. The main changes introduced by the Consumer Defense Code are described below.

- Financial institutions must ensure that clients are fully aware of all contractual clauses, including responsibilities and penalties applicable to both parties, in order to protect the counterparties against abusive practices. All queries, consultations or complaints regarding agreements or the publicity of clauses must be promptly answered, and fees, commissions or any other forms of service or operational remuneration cannot be increased unless reasonably justified (in any event these cannot be higher than the limits established by the Central Bank).
- Financial institutions are prohibited from transferring funds from their clients' various accounts without prior authorization.
- Financial institutions cannot require that transactions linked to one another must be carried out by the same institution. If the transaction is dependent on another transaction, the client is free to enter into the latter with any financial institution it chooses.
- Financial institutions are prohibited from releasing misleading or abusive publicity or information about their contracts or services. Financial institutions are liable for any damage caused to their clients by their misrepresentations.
- Interest charges in connection with personal credit and consumer directed credit must be proportionally reduced in case of anticipated settlement of debts.
- There must be adequate treatment for the elderly and physically disabled.

DATA PROTECTION

Brazil enacted the Brazilian General Data Protection Law (Federal Law no. 13,709/2018 or "LGPD") on August 15, 2018. The LGPD is Brazil's first comprehensive data protection regulation and it is largely aligned to the EU General Data Protection Act ("GDPR"). Certain LGPD provisions were later amended to, among other modifications, create the National Data Protection Authority ("ANPD") and postpone its effectiveness to August 2020, rather than February 2020, as set forth when the LGPD was first published.

The LGPD applies to any processing operation carried out by a natural person or a legal entity, of public or private law, irrespective of the means used for the processing, the country in which its headquarter is located or the country where the data are located, provided that:

- The processing operation is carried out in Brazil;
- The purpose of the processing activity is to offer or provide goods or services, or the processing of data of individuals located in Brazil; or
- The personal data was collected in Brazil.

LGPD provides rights to data subjects and several obligations to the processing of personal data (defined as any information related to an identified or identifiable natural person). LGPD also imposes obligations to be observed prior to international transfer of personal data as well as notification requirements in scenarios of data breaches which may cause relevant risk or damage to data subjects.

Prior to the LGPD, data privacy regulations in Brazil consisted of various provisions spread across Brazilian legislation. For example, Federal Law no. 12,965/2014 and its regulating Decree no. 8,771/16 (together, the Brazilian Internet Act), which imposes some requirements regarding on security and the processing of personal data and other obligations on service providers, networks and applications providers, as well as rights of Internet users.

Furthermore, general principles and provisions on data protection and privacy are set forth in the Federal Constitution, in the Brazilian Civil Code and other specific laws and regulations that address particular types of relationships (eg Brazil's Consumer Defense Code and labor laws), particular sectors (eg financial institutions, health industry and telecommunications) and professional activities (eg medicine and law).

Specially in relation to finance institutions, Resolution no. 4,658/2018 of the Central Bank imposes cyber security requirements and set forth standards for contracting data processing services, such as storage and cloud computing services. The provisions of such Resolution must be observed by financial institutions and other institutions authorized to operate by the Central Bank of Brazil.

Money laundering regulations

Brazilian Law No. 9,613, of March 3, 1998, as amended by Law No. 12,683, of July 9, 2012 (the Anti-Money Laundering Law) plays a major role for those engaged in banking and financial activities in Brazil. The Anti-Money Laundering Law sets forth the definition and the penalties to be incurred by persons involved in activities that comprise the laundering or concealing of property, rights and assets, as well as a prohibition on using the financial system for these illicit acts.

In addition, the Brazilian Anti-Money Laundering Law created the Financial Activity Control Council (Conselho de Controle de Atividades Financeiras or "COAF"). The main role of the Financial Activity Control Council is to promote cooperation among the Brazilian governmental bodies responsible for implementing national anti-money laundering policies, in order to stem the performance of illegal and fraudulent acts. Their activities also include imposing administrative fines and examining and identifying suspected illegal activities pursuant to the Anti-Money Laundering Law.

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What type of funding arrangements and incentives are available to FinTech businesses?

Early stage

SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early

growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

ACCELERATORS

There are various incubators or accelerators in the Brazilian market which offer support, facilities and funding for startups, often in return for an equity stake. For example, Bradesco, one of the largest private banks in Brazil, has an innovation program that selects startups producing solutions adjustable to the financial market (known as inovaBra) and maintains a corporate venture (through an investment fund) to invest in such companies. Other banks have similar initiatives, such as the Cubo coworking by Itaú and Redpoint eVentures and the competition 'Fintech Venture Day' sponsored by Santander InnoVentures (the bank's FinTech investment fund), or the recently launched "Labbs" by Banco do Brasil (which is a platform developed to connect the bank to start-ups).

Venture capital and debt

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

An additional funding option is venture debt, which is typically structured as a three-year term loan (or series of loans), which is secured against a company's assets and includes an equity element allowing the debt provider to purchase shares in the company. However, venture debt providers will usually only invest into companies that have already received investment through venture capital.

Warehouse and platform funding

Warehouse financing may be suitable for FinTech companies which own a portfolio of assets. Funding is often provided by way of a loan from a small number of lenders to a special purpose vehicle (SPV) or a fund (FIDC). The loan is secured on the assets acquired by the SPV or the FIDC from the originator. The lenders will only fund a portion of the assets, with the remainder being financed by way of subordinated lending from the originator.

Senior bank debt and capital markets funding

SENIOR BANK DEBT

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

CAPITAL MARKETS FUNDING

Brazil has both debt and equity capital markets which are accessible to businesses (usually of a certain size and as long as it is incorporated as a corporation (*sociedade anônima*), as opposed to a limited liability company (*limitada*)).

Furthermore, a FinTech company may decide to offer either a full public offer of securities or a public offer with limited marketing efforts.

On 16 January 2009, CVM enacted Instruction No. 476 which establishes that a public offering of certain securities will no longer be subject to registration with CVM or have to comply with CVM provisions relating to public offerings of securities, if they comply with the following requirements (limiting, in general, their marketing efforts) namely:

- involve one of the securities mentioned in Instruction No. 476, including, but not limited to commercial notes, banking credit certificates that are not the responsibility of a financial institution, debentures not convertible into shares, real estate or agribusiness rights certificates issued by securitization companies registered with the CVM as publicly-held companies, quotas of close-ended investment funds and financial notes (*letras financeiras*);
- be only targeted to qualified investors (as defined in the applicable regulation of CVM);
- be mediated by members of the securities distribution system;
- be marketed to a maximum of 75 qualified investors and subscribed or acquired by no more than 50 qualified investors; and

- not involve marketing activity through stores, offices and establishments open to the public or public communication services.

Public offers to any other type/number of investors are not covered by that exemption and have to comply with the applicable requirements of CVM, including the preparation of a full prospectus on the issuer and the transaction.

Incentives and reliefs

Recently, Brazilian tax authorities have regulated angel investors through the application of tax regimes in respect of the capitalization of companies. Under Normative Ruling RFB No. 1,719/2017, the seed investor is entitled to earn income from capital it has invested which is subject to withholding income tax at rates varying from 15% to 22.5%, depending on the length of the investment. This type of angel investment is treated like a financial market investment and not as an equity contribution, as would be the norm and which otherwise would make it subject to dividend payments which are not subject to withholding tax.

With respect to tax incentives for FinTechs, there are no specific tax benefits for this sector but some general tax incentives may apply, such as:

- FinTech businesses with annual (12-month period) gross revenue of up to BRL$4.8 million (four million and eight hundred thousand Brazilian Reais) may be subject to taxes over its gross revenues under a simplified tax regime called 'Simples Nacional', provided that certain thresholds set in the legislation are complied with. Simples Nacional is an optional taxation regime designed to simplify the collection of taxes of micro or small businesses which allows the collection of municipal, state and federal taxes at simplified standard rates based on the monthly gross revenue of the company.
- Certain Brazilian municipalities grant reduced service tax rates from 5% to 2% to attract new businesses. FinTechs which are typical service providers (and not financial institutions) may take advantage of this incentive by setting up operations in those municipalities.

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Portfolio sales

Loan transfers and portfolio sales

What are common ways of buying and selling loans?

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio pursuant to overarching terms.

In Brazil, there are three potential pieces of regulation that affect this market. First, there is the general rule for the assignment of rights set out in the Brazilian Civil Code. In relation to financial institutions, certain resolutions and circulars from the Central Bank of Brazil also impose restrictions on this type of activity. Finally, as most of the purchasers of this type of asset are investment funds (known as investment funds in credit rights (*Fundo de Investimento em Direitos Creditórios*, or FIDC)), the applicable regulation of the Brazilian Securities Commission (CVM) is also relevant.

The Brazilian Civil Code allows creditors in general to assign their rights, provided there is no limitation arising out of the nature of the credit, the applicable laws or the contractual relationship between them and the debtor. It also imposes certain formalities in relation to the transaction documentation. In this respect, an assignment is only binding as against third parties if it is executed through a public document (ie a document issued by a competent Registry) or a private instrument with the place and date of its execution indicated, the purpose of the business specified and the parties (assignee and assignor) clearly identified. Also, the agreement (or another document evidencing the assignment) has to be registered with the competent Registry of Deeds and Documents in Brazil. Finally, the Brazilian Civil Code prescribes that the assignment is only valid as against the underlying debtor that is notified of the assignment. It is important to stress that, unless otherwise provided for in the original agreement, the prior approval of the debtor is not necessary. The debtor has only to be notified of the assignment, by any means legally possible.

Brazilian Central Bank regulation also plays an important role. Central Bank Regulations are basically divided into two categories: regulations relating to situations where the assignee is another financial institution and those relating to situations where the assignee is not a financial institution. There are some important differences between the two categories. First, if the assignee is not a financial institution, the assignment may not benefit from the co-obligation of the assignee (ie the assignee is not responsible for the default of the underlying debtor). Secondly, the purchase price paid by a non-financial institution may not be in instalments. In this case, the payment

has to be made with immediately available funds at the date of the financial settlement of the transaction. Finally, and maybe most importantly, the repurchase of the assigned credits is not allowed. These restrictions are generally not applicable to transactions with FIDCs.

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What are the main considerations when transferring a loan and related security?

There are a number of issues to consider before transferring a loan or a portfolio of loans. These issues are often covered as part of a due diligence exercise. Some of the key considerations include:

- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser;
- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms; and
- **consent** – whether a transfer requires the consent or notification of any other parties.

In addition, Resolution No. 3,533 from the National Monetary Council (CMN) dated 31 January 2008, provides changes to the manner in which assigned credit rights are to be treated in the books of financial institutions (pursuant to CMN Resolution No. 3,809 of 28 October 2009). In accordance with Resolution No. 3,533, if the assignor substantially retains the risks and benefits of the assigned credits, such credits may not be recorded as off-balance sheet loans. This provision is applicable to:

- assignments with repurchase commitments;
- assignments in which the assignor undertakes the obligation to compensate the assignee for losses; and
- assignments made jointly with the acquisition (or subscription) of subordinated shares in FIDCs by the assignor.

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Projects

Financing / investing in energy / infrastructure

To what extent are energy and infrastructure assets publicly or privately owned?

Generally

The ownership of infrastructure assets varies in Brazil according to the class of the assets. Some assets are completely owned by the government and some assets are owned by private companies. As state-owned companies are facing difficulties for investing in infrastructure, the government is opening space for investment in the sector to private entities, by means of concessions and public-private partnerships. Currently, approximately two thirds of the total invested in infrastructure in Brazil comes from the private sector.

Even with the increase in the participation of private companies, a large part of the funding for infrastructure projects is still provided by public banks, especially the Brazilian Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social*, or BNDES).

The key sectors are considered below.

Energy

In the energy infrastructure, the private companies already have a significant role. The government does not invest directly in energy, providing the investments through the state-owned companies, especially PETROBRAS and ELETROBRAS, companies that hold a large influence in energy projects.

In several cases, investments in energy projects are provided by means of partnerships between the state owned companies (PETROBRAS and ELETROBRAS) and private companies, increasing the influence of the private companies in energy projects.

Since PETROBAS and ELETROBRAS are passing through a moment of crisis, private investment in energy projects is increasing, a trend which is likely to continue in the coming years.

Notwithstanding the above, in November 2019, President Jair Bolsonaro signed a bill of law authorizing and establishing the rules of ELETROBRAS 'privatization. The Brazilian government intends to capitalize on ELETROBRAS, which has been losing market share in the generation and transmission market. This privatization is expected to take place in the second half of 2020, however, this bill of law must fulfil all legislative rite until its enactment.

Telecoms infrastructure

Brazilian telecommunications infrastructure is privatized. The privatization took place at the end of the 1990s and reduced the public investments. It is now one of the infrastructure sectors where government intervention is lowest.

Recently the bill of law PLC 79/2016 was converted into Law 13,789, dated as of October 3, 2019 ("Law 13,789"), which promoted several changes to the Brazilian General Telecommunications Law and allowed the Brazilian Agency of Telecommunications (ANATEL) to transform current fixed telephone concessions into authorizations, more flexible and less bureaucratic. With the enactment of Law 13,789 important investment values are expected in the coming years.

Transport infrastructure

In transport infrastructure, private investment is predominant. In railroads and ports, public sector investment is secondary, even though still prevalent in railroads investments amounts. In the roads, several concession programs have increased the participation of private companies, but the presence of the public sector is still significant. In the airports, the development of the concession programs is similar to that of the roads. Both the Federal government and private companies provide some investment in waterways as it is a sector with high growth potential during the next years.

The predominance of the private sector in the transport infrastructure is increasing, as the concessions and privatizations are being fostered in roads, railroads, ports and airports.

Other infrastructure

SANITATION

Brazilian state-owned companies and concessions play a dominant role in sanitation infrastructure assets. It is likely that the state-owned companies will face more difficulties with investment in sanitation in the coming years, considering the problems with water resources and the impact of the fiscal adjustments in public investments. In view of this situation, it is anticipated that private investment in sanitation will keep increasing over the coming years. However, the level of difficulty on these projects should be mentioned. In instances, whether by technical issues, abandonment of the concessionaire or other causes, 60% of stalled infrastructure projects are related to sanitation projects. Nonetheless, the sanitation infrastructure projects consist on 9% of the total amount of stalled projects.

HEALTH

In Brazil, investment in the health sector is provided by the government and by private entities, with private investment slightly more prevalent.

EDUCATION

The investments in Brazilian primary education are mainly provided by the public sector. Private investment in primary education corresponds to approximately 20% of the total investment in education assets. However, in higher education, private investment is dominant, corresponding to 75% of the total investment in education. The tendency for the next few years is for higher private sector investment in education.

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Are there special rules for investing in energy and infrastructure?

Generally

In Brazil, there are several governmental agencies regulating investment in energy and infrastructure. Every company (including the state-owned companies) which intends to invest in energy and infrastructure is subject to the rules of such governmental agencies.

The governmental agencies have the purpose of establishing internal rules (Decrees and Normative Instructions) for the regulation and supervision of the activities performed by the investors in the specific sectors of Brazilian economy.

Below is the list of the agencies responsible for certain key sectors.

Energy

The

The main regulatory authorities regarding energy sector include:

- Ministry of Mines and Energy (MME);
- National Policy Council of Energy (CNPE);
- Electricity Sector Monitoring Committee (CMSE);
- Operator of the National Electricity System (ONS);
- Energy Research Company (EPE);
- Electric Power Commercialisation Chamber (CCEE);
- National Water Agency (ANA);
- National Agency of Petroleum, Natural Gas and Biofuels (ANP); and
- Brazilian Electricity Regulatory Agency (ANEEL);

Telecoms infrastructure

The sector of telecommunications is privatized and the private companies are subjected to the rules established by the Brazilian Agency of Telecommunications (ANATEL).

Transport infrastructure

- Waterway transportation is regulated by the National Waterway Transportation Agency (ANTAQ);
- Railroads and roads transportation are regulated by the National Agency of Land Transportation (ANTT); and
- Airways transportation is regulated by the National Civil Aviation Agency (ANAC).

Other infrastructure

The social infrastructure is also regulated by governmental agencies.

Health infrastructure is regulated by the Health Ministry and by the agencies bounded to it, such as the National Agency for Supplementary Health Services (ANS); and the National Health Surveillance Agency (ANVISA).

Education Infrastructure is regulated by the Ministry of Education, which is assisted by the National Education Board.

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What is the applicable procurement process?

The procurement process for Energy and Infrastructure in Brazil is provided by means of concessions and public-private partnerships. Both processes are used by the government to increase private investment in energy and infrastructure assets, as state-owned companies are facing severe financial difficulties for new investments.

Below is a more detailed explanation about the forms of investment and funding in energy and infrastructure assets.

Investing in energy and infrastructure

Infrastructure and energy projects may be implemented under several regimes, depending on their nature and in particular whether they legally qualify as public services, activities within the constitutional attribution of the Union or of the States or regulated private activities. Considering the involvement of public and private sectors, all the projects and activities may be defined as a partnership between the government and private entities, which may be formalized under the following regimes:

COMMON CONCESSIONS

The activities designated as public services by the applicable law can only be transferred to private parties through long-term concession agreements or, exceptionally, through permissions (which may be perceived as less stable, but without substantive differences in practice). In both cases, the concession will be a result of a formal public bidding procedure. This procedure is governed by the Federal Law No. 8,987 of 1995.

In common concessions, the private entities are responsible for obtaining the remuneration for the provided services, in a direct relationship with the users of the contracted services.

PUBLIC-PRIVATE PARTNERSHIP

The public-private partnership is governed by the Federal Law No. 11,079 of 2004 and consists of an agreement entered into by and among the government and a private entity for works or services in an amount higher than R$20 million and for a period of more than five years and less than 35 years.

Public-private partnerships are different from the common concessions because of the way the private entities are remunerated. In public-private partnerships, the remuneration of the private entities is usually paid by the public entity which hired the private entity.

There are activities in the infrastructure sector not designated as public services and usually not involving scarce resources or natural monopolies, which may be carried out by private agents with more flexibility. Such activities may be conducted by private entities without the need for a concession or a public private partnership, being subject only to sector-specific regulation and a non-discretionary authorization, on the top of environmental and other legal requirements applicable to business activities in general.

Financing energy and infrastructure

The Brazilian Development Bank (BNDES) plays a dominant role in financing energy and infrastructure assets. *Caixa Econômica Federal* and *Banco do Brasil,* the other two large state-owned banks, increased their market share. However, the finance provided by these entities is not sufficient for the investment in infrastructure planned by the government for the coming years, and the investment provided by private companies has become necessary for the execution of the infrastructure projects.

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What are the most common forms of funding / investing in energy and infrastructure?

Funding

The most common forms of funding in Brazilian Infrastructure and energy assets include:

- project-finance loans;
- corporate-finance loans; and
- infrastructure debentures.

The majority of the investments in Brazilian energy and infrastructure assets are provided by BNDES. Even in the projects developed under concessions and public-private partnerships, the presence of the state-owned bank is still high.

Investing

Private companies investments in energy and infrastructure assets are usually provided by means of equity.

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Restructuring

Enforcement and sanctions

When can there be regulatory investigations?

When the Central Bank considers that an authorized firm or regulated individual may have breached the ongoing compliance requirements, it will launch a formal investigation. This may result in regulatory sanctions.

The Central Bank also carries out regular audits of authorized firms.

Furthermore, the Resolution No 4,595/2017 sets forth that the implementation of a Compliance Program is mandatory to all the financial institutions or other institutions regulated by the Central Bank.

There is no specific penalty prescribed in this Resolution on institutions that do not implement the Compliance Program. However, it establishes that the Central Bank is authorized to enact other rules and other measures in order to guarantee the enforcement of the mentioned Resolution No 4,595/2017.

The CVM is also entitled to investigate, by launching an administrative procedure, illicit acts and non-equitable practices of administrators, board members and shareholders of listed companies, intermediaries and other participants of the market, pursuant to Law 6,385/1976. This may also result in regulatory sanctions applied by CVM.

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What regulatory penalties may apply?

Penalties range from warnings to the intervention or liquidation of the financial institution, depending on the infraction.

The Central Bank may intervene in the operations of a financial institution not controlled by the Brazilian government if there is a material risk for creditors, or if the financial institution frequently violates applicable regulations. The Central Bank may also intervene if liquidation can be avoided or it may perform administrative liquidation or, in some circumstances, require the bankruptcy of any financial institution, except those controlled by the Brazilian government.

In addition to the aforesaid procedures, the Central Bank may also establish the Temporary Special Administration Regime (*Regime de Administração Especial Temporária* or RAET) which is a less restrictive form of intervention by the Central Bank in private and non-federal public financial institutions and which allows institutions to continue to operate normally.

The RAET may be imposed by the Central Bank in the following circumstances:

- continuous practice of transactions contrary to the economic and financial policies established by federal law;
- the institution fails to comply with the Compulsory Reserves rules established by the Central Bank;
- suffers losses that put its creditor at risk due to inadequate management;
- repeatedly breaches Brazilian banking rules and regulations;
- the institution reckless or fraudulent management;
- the institution faces a shortage of assets; and

- the occurrence of any of the events described above that may result in a declaration of intervention.

The main objective of the RAET is to assist with maintaining the solvency and financial conditions of the institution under special administration and avoid intervention and/or liquidation. Therefore, the RAET does not affect the day-to-day business operations, liabilities or rights of the financial institution, which continues to operate in its ordinary course. The RAET also immediately results in the loss of the term of office of the administrators and members of the Audit Committee of the institution.

There is no minimum term for a RAET, which may cease upon the occurrence of any of the following events:

- acquisition of share control of the financial institution by the Brazilian federal government;
- corporate restructuring, merger, spin-off, amalgamation or transfer of the controlling interest of the financial institution;
- when, at the discretion of the the Central Bank, the institution's situation has normalized; or
- declaration of extra-judicial liquidation of the financial institution.

An administrative liquidation of any financial institution (with the exception of public financial institutions controlled by the Brazilian government) may be carried out by the Central Bank if it can be established that:

- the institution's economic or financial situation is at risk, particularly when the institution ceases to meet its obligations as they become due, or upon the occurrence of an event that indicates a state of insolvency under the rules of Law No. 6,024;the financial institution is deemed insolvent;
- the financial institution has incurred losses that could abnormally increase its unprivileged and exposure of the unsecured creditors;
- management of the relevant financial institution has materially violated Brazilian banking laws, rulings or regulations; or
- upon cancellation of its authorization to operate, the financial institution does not initiate ordinary liquidation proceedings within 90 days or, if initiated, the Central Bank determines that the pace of the liquidation may represent a risk to its creditors. Liquidation proceedings may otherwise be requested, on reasonable grounds, by the financial institution's officers, if its respective bylaws entitle them to this jurisdiction, or by the intervener appointed by the Central Bank in the intervention proceeding, with an indication of the causes of the request.

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What criminal penalties may apply?

Following formal investigation, the offenders are subject to criminal penalties in certain cases, including, but not limited:

- insider dealing and misleading statements and practices;
- breaches of the Money Laundering Regulations; and
- conducting regulated activities when not authorized.

These penalties are mainly set out in the Acts on Crimes Against the National Financial System (Act No. 7,492/86); in the Act on Tax Evasion and Crimes Against the Economic Order (Act No. 8.137/90) and in the Anti-Money Laundering Act (Act No. 9.613/98). The penalties may range from fine to imprisonment.

Apart from the above-mentioned criminal Acts, companies are also subject to the administrative and civil sanctions set forth in the Brazilian Clean Company Act (Act No. 12,846/2013), in case of illicit acts committed against the Brazilian or foreign public administration.

According to the mentioned Act 7,492/86, both Central Bank and CVM are entitled to assist the Federal Prosecution Office in the course of the criminal action whenever the crime is practiced in the context of the activities that are subject to the regulators' discipline and inspection.

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Tax

Tax issues

Are stamp, registration, transfer or other similar taxes applicable?

Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?

There are no stamp, registration or transfer taxes in Brazil. However, financial transactions are subject to the financial transactions tax (IOF), which applies to a variety of transactions, including loans, its transfer or assignment. IOF rates and basis vary depending on the nature of the transaction. The rates range from 0% to a maximum of 25%, depending on the type of financial instrument. The federal government can modify these rates at any time.

Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?

There are no stamp, registration or transfer taxes in Brazil. However, the IOF rules explained above also apply to the taking, transfer or assignment of a mortgage, debenture or other security. Specific exemptions may apply and a case by case analysis is recommended.

Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?

There are no stamp, registration or transfer taxes in Brazil. However, the IOF rules explained above also apply to the taking, transfer or assignment of a debt security. Specific exemptions may apply and a case by case analysis is recommended.

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Do tax authorities take priority on enforcement?

On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?

Yes, Brazilian tax authorities take priority over any other creditor, except creditors under labor law and labor accident law. However, in the event of a bankruptcy, tax authorities do not take priority over creditors with security over real estate property (ie a mortgage).

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Is withholding tax on interest payments applicable?

Is there withholding tax on interest payments under a loan?

Interest paid under a loan transaction is subject to withholding tax in Brazil.

If so:
What is the rate of withholding?

For interest payments made under loans granted by Brazilian legal entities, withholding income tax applies at the following rates, which vary in accordance with the term of the loan agreement:

- 22.5% for loans with a maturity term of up to 180 days;
- 20% for loans with a maturity term of between 181 and 360 days;
- 17.5% for loans with a maturity term of between 361 and 720 days; and
- 15% for loans with a maturity term longer than 720 days.

Please note that the payment, credit or remittance of interest amounts outside of Brazil is subject to withholding income tax at a 15% rate, or at a 25% rate, if the lender is domiciled in low haven jurisdictions.

What are the key exemptions?

A 0% withholding income tax rate applies to interest amounts paid, credited, or remitted to recipients not resident in Brazil in connection with loan agreements entered into with the sole purpose of stimulating export transactions.

Under certain double tax treaties entered into by Brazil, a lower withholding tax rate applies to the payment, credit, or remittance of interest to a resident of the treaty partner country.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

In general, interest payments under debt securities are also subject to the same withholding income tax rules as described above.

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Are foreign lenders and debt security holders subject to tax on interest payments?

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

The transfer of funds into Brazil by way of loan between a foreign lender and a domestic borrower is subject to the financial transactions tax (IOF), at a 6% tax rate, if the loan's average maturity term is 180 days or less. For loans with an average maturity longer than 180 days, the IOF is currently reduced to 0%.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

Last modified 4 Dec 2019 | Authored by Campos Mello Advogados

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